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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 26

THE UNITED STATES, PETITIONER

vs.

ALTEA BAND OF TILLAMOOKS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 24, 1945.
CERTIORARI GRANTED OCTOBER 29, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387

THE UNITED STATES, PETITIONER

vs.

ALCEA BAND OF TILLAMOOKS ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
History of proceedings	1	1
Second amended petition	1	1
General traverse to second amended petition	29	20
Argument and submission of case	29	20
Special findings of fact	34	23
Conclusion of law	73	61
Opinion, Littleton, J.	73	61
Plaintiff's Exhibit No. 2—Map showing tribal distribution	97	Pasted
Judgment	99	84
Proceedings after entry of judgment	101	84
Clerk's certificate [omitted in printing]	103	--

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In the Court of Claims of the United States

No. 45230

ALCEA BAND OF TILLAMOOKS; YAH-QUO-NAH BAND OF TILLAMOOKS; SELETCA BAND OF TILLAMOOKS; NE-A-CHESNA BAND OF Tillamooks; Ump-Qua Tribe; Quans-Sake-Nah, Klen-Nah-Hah, and Ke-Ah-Mas-E-Ton Bands of Nas-O-Mah or Coquille Tribe; Ko-Se-E-Chah Band of Too-Too-To-Neys, Se-Qua-Chee Band of Too-Too-To-Neys; Too-Too-To-Ny Band of Too-Too-To-Neys; Chet-Co Tribe; Yah-Shute Band of Too-Too-To-Neys; Whis-To-Natin Band of Too-Too-To-Neys; Cos-Sa-To-Ny Band of Too-Too-To-Neys; Chet-Less-Ing-Ton Band of Too-Too-To-Neys; Port Orford Band of Too-Too-To-Neys; Eukie-Chee Band of Too-Too-To-Neys; Kus-So-To-Ny Band of Too-Too-To-Neys; Kler-It-La-Tel Band of Too-Too-To-Neys; Te-Cha-Quot Band of Too-Too-To-Neys; Mack-A-No-Tin Band of Too-Too-To-Neys; Cah-Toch, Chin-Chen-Ten-Tah-Ta, Whiston, and Klen-Hos-Tun Bands of Coquilles; Chinook Tribe; Clatsop Tribe; Ne-Ha-Lum Tribe; Confederated Tribes of the Grand Ronde Community, Oregon; Willamette Valley Confederated Tribes of Indians; Siletz Confederated Tribes of Indians; and Portions and Descendants of All Such Tribes and Bands.

v.

THE UNITED STATES

History of proceedings

The original petition was filed August 6, 1940.

An amended petition was filed on August 23, 1940.

On March 20, 1943, on motion made therefor, and allowed by the court, the plaintiff filed its second amended petition, which is as follows:

Second amended petition

Filed March 20, 1943

In compliance with the rules of this Honorable Court and in keeping with the allegations of its original petition as first
2 amended with respect to subsequent amendment giving more particularity, Plaintiffs by way of amended petition state:

I

Plaintiffs bring this suit against the defendant, the United States, under the authority of the Act of Congress approved

August 26, 1935 (49 Stat. 801), entitled "An Act Conferring Jurisdiction Upon the Court of Claims to Hear and Determine Claims of Certain Bands or Tribes of Indians Residing In the State of Oregon" which said Act is in words and figures as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143), and December 21, 1855 (12 Stat. 981), may have against the United States; and (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being
3 the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

"SEC. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; and any payment which may have been made under any claim or agreement shall not operate as an estoppel but may be pleaded as a setoff, and the United States shall be allowed to plead, and shall receive credit for all sums, including gratuities, paid to or expended for the benefit of the respective tribes or bands of Indians, but no expenditures for the benefit of these Indians made out of appropriations authorized by the Act of June 18, 1934 (48 Stat. L. 984) shall be considered as

offsets. The claim or claims of each tribe or band may be presented separately or jointly by petition, subject, however, to amendment and consolidation in proper cases. Such action or actions shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any nation, tribe, or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court.

"The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act.

4 "Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall allow the attorney or attorneys access to such treaties, papers, correspondence, or records as may be needed by said attorney or attorneys.

"SEC. 3. That upon the final determination of such suit, or suits, the Court of Claims shall decree such fees not exceeding 10 per centum of the amounts recovered as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, together with all necessary and proper expenditures incurred in the preparation and prosecution of the suit or suits.

"SEC. 4. The proceeds of all amounts, if any, recovered for said Indians, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the original judgment or decree and thereafter shall be subject to appropriation by Congress."

II

The plaintiffs entered into a contract on March 20, 1937 with Daniel B. Henderson and John G. Mullen, attorneys of this Court. After the contract of employment was entered into said Daniel B. Henderson became seriously ill and was unable to represent said plaintiffs and an assignment of part of the contract of attorneyship was duly made to Sanders, Gravelle, Whitlock & Howrey, attorneys of this Court by John G. Mullen on May 23, 1940. Under said contract and assignment said attorneys are duly authorized to represent the plaintiffs and to file and prosecute this suit in their

behalf. Said original contract of March 20, 1937 was duly executed in behalf of the aforesaid tribes or bands of Indians by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior and the original contract of March 20, 1937 has been duly approved by the Commissioner of Indian Affairs and the Assistant Secretary of the Interior. The assignment of a part of the contract of May 23, 1940 has been duly approved by the Assistant Commissioner of Indian Affairs and the Assistant Secretary of the Interior.

That as to the Indians not covered by such assigned contract the Attorneys signing this petition are and were duly employed to prosecute such claims and are under contract with said Indians approved in accordance with existing law.

III

From time immemorial plaintiffs occupied, held and used the lands described in the unratified treaties mentioned in said Act and certain other tracts being a part of the territory from the Columbia River on the north, south to the State of California, west to the Pacific Ocean, east to the summit of the Coast Range of mountains and certain other lands west of the Cascade Range of mountains and north of the State of California except that portion thereof occupied by the Coos Bay, Lower Umpqua and Siuslaw Tribes of Indians. Such tribal possessions were marked by well defined natural boundaries and recognized by all other tribes or bands of Indians.

That the tract of land herein described was not all held jointly by the plaintiffs herein but were occupied, held and used in some instances by an individual tribe and in other instances with joint bands or joint tribes and the judgment hereafter prayed should be several or joint as required to meet the ends of justice.

That the exact amount of credits and offsets are unknown to plaintiffs but the plaintiffs are justly entitled to recover the amounts hereinafter claimed after allowing just credits and offsets.

IV

The President under the authority of the Act of Congress of June 5, 1850, appointed several Commissioners to negotiate treaties with the Indian Tribes or bands in the territory of Oregon for the extinguishment of their title to lands lying west of the Cascade Range of Mountains.

That after the appointment of commissioners to carry out the provisions of the Act of Congress of June 5, 1850, the plan was changed by Act of Congress approved February 27, 1851, and Joel Palmer, Superintendent of Indian Affairs in Oregon, was authorized to and did negotiate many treaties including the unratified treaties described in said Jurisdictional Act.

Thereafter under dates of September 10, 1853, September 19, 1853, November 18, 1854, November 29, 1854, January 22, 1855, and December 21, 1855, Joel Palmer, Superintendent of Indian Affairs in Oregon, negotiated treaties for the cession of their lands with the various Indian tribes and bands occupying all that portion of Oregon lying between the Columbia River on the north, the Cascade Mountains on the east, the Oregon-California line on the south, and, in the main, the Coast Range of Mountains on the west, and the same were duly ratified and confirmed by the Congress of the United States.

That at the time of the execution of said unratified treaty the Plaintiff Indians described therein had occupied, held and used from time immemorial the lands described therein and the lands hereinafter more particularly described and had immemorially held Indian title, claim, and rights to said lands and appurtenances.

7 V

That the bands of Tillamooks, the bands of Coquilles and the bands of Too-too-to-neys including the Chetco tribe, all plaintiffs herein, are for convenience referred to hereinafter as Tillamooks, Coquilles and Too-too-to-neys respectively. That the lands so occupied, held and used by the Tillamooks, and to which they held the Indian title, claim and rights, are described as follows: Commencing at the mouth of the north ten mile creek about midway between the Alsea and Sien slaw River, running thence east to the summit of the Coast Range of mountains, thence north along said summit to a point due east from Cape Lookout, thence west to the Pacific Ocean at said Cape Lookout, thence in a southerly direction along said Pacific Coast line to the point of beginning.

VI

That the lands so occupied, held and used by said Too-too-to-neys are described as follows: Starting at Four Mile Creek situated four miles south of the mouth of the Coquille River on the Pacific coast running east four miles, thence following along the water shed between the south fork of the Coquille River and

the headwaters of the Flores River and Sixes River in a southeasterly direction to Illahe, (town) situated in the Rogue River drainage, thence in a northeasterly direction along the divide between the headwaters of the south fork and middle fork of the Coquille River and the headwaters of tributaries of the Rogue River and the Cow Creek tributary of the Umpqua River to Camas Valley located at a point near the easterly boundary of said unratified treaty of the land described in the unratified treaty; thence in a southerly direction following the easterly line of said land described in the unratified treaty to
8 the California state line; thence west to the Pacific Coast line; thence in a northerly direction along said coast line to the point of beginning.

VII

That the lands so occupied, held and used by the Coquilles including the Chetco tribe are described as follows: All that land lying between the easterly and westerly boundary of the land described in said unratified treaty lying between the northerly line of the land hereinbefore described as belonging to said Too-too-to-neys and a line commencing at Cut Creek or Whiskey Run or three miles north of the mouth of the Coquille River, thence in a northeasterly direction following the divide between south Slough, Island Slough, and Sumner Slough, on the north, and the drainage of the lower Coquille River on the south, thence along the divide between the south fork of Coos River on the north and the drainage of upper Coquille River on the south in a southeasterly direction to the east line of the land described in the unratified treaty at Camas Valley.

VIII

That on the dates in August, 1855 set out in said unratified treaty (sometimes called treaties because the one treaty was signed by different tribes at different times) the tribes and bands of Indians described therein signed and entered into said unratified treaty which is set out on pages 8 to 15 of said Document 25 as described in said Jurisdictional Act. Said unratified treaty reads as follows:

"Articles of agreement and convention made and concluded at the places and dates hereinafter named, in the Territory of Oregon, by Joel Palmer, Superintendent of Indian Affairs, on the part of the United States, and the following chiefs and headmen of the confederate tribes and bands of Indians residing
9 along the coast west of the summit of the Coast Range of mountains and between the Columbia River on the north

and the southern boundary of Oregon on the south, they being duly authorized thereto by their respective bands, to wit:

Lonie, Cal-he-na, Jel-kete, Albert, Kihose, Sme-ka-hite, Quick-ouse Kos-kup, Qua-mah, Kle-ick, Pah-hi, Ha-ake, Tu-e-to, Que-lis-ka, and Quo-op-pa, of the *Alcea band* of Tila-mooks; Jim, Con-chu, Toch-a-lie, Pah-ni-ka-u, No-cos-curt, Tlate-hal, He-a-kah, Sam-may, Ke-etch, and John of the *Yah-quo-nah* band of Tilamooks; Jim, Sis-nah-quo-lin, Scho-yo, Kle-con-onts, Yon-ton, Flouched, To-cot-so, Jake, Chah-qub-lah, Chin-na-quo-wash, Tu-e-uch, Ah-sis-lep, Se-cow-in, Jo-han-na, and Yet-sit, of the *Seletsa* band of Tillamooks; John, of the *Ne-a-ches-na* band of Tilamooks; Eneos, De-Chaum, John, Pos-cal, Halo-tuth, Kal-la-wot-sa, Ha-lo-gleese, Bi-cham-an, Louis, Lake-man, Jerome, Peir, and Wilson, of the *sin-slau* tribe; Jim Tim, Tom, Sam, Fat-tim, Don-quix-otte, Charley, Que-il-me, Qui-it, and Ha-lo-lea-no, of the Kal-a-wot-set or *Ump-qua* tribe; Jim 1st, Bob, John 1st, George, William, Charley 1st, Dock, Dick, Ole-man-doctor, Tom 1st, Captain, Stephen, Cal-lolt, Wol-lonch, Loch-itch, Wol-loch, Pete, Jackson, Hal-lice, Taylor, Pe-lee-gray, Joe, Sam 1st, Charles 2d Sam 2d Jim 2d, Johnson, Charley 3d, Ole-man, Jack, Tom 2d, Jim 3d, John 2d, Gabrial, Cris, Kah-tite, Ne-at-tal-woot, Jake, Quin-ul-chet, Yet-so-no, Lolkt, Damon, Ka-tow-na, Loch-hite, Ten-ach, Ki-hi-ah; How-seach, Ko-at-qua, Solomon, Lol-lotch, Skil-a-milt, Yah-who-wich, Tes-ich-man, How-new-wot, Squat-kle-ah, Ki-wot-set, Al-la-wom-mets, Too-toe, and No-whe-na, of the Kowes Bay tribe, T-sin-no-nas, Pil-le-kis, Clas-an-ta, Sat-toe, Wah-hench, Tom, Joe, Mal-o-quock, Won-ot-tlos, Mil-luck, John 1st, Charley, Che-kaw-nah, Qume-mos T-sha-saw, Kow-u-quaw, Sands, T-sis-tah-noo-ka, Mah-tlose, Chil-lah, How-ouse, Charles, Lah-lee, Noc-to-soch, O'Chayly, Klong-klus, Bill, Other-tom, Yohn, Nelson, Socks-ey, Joe-Lane, Frank, John 2d, Jim, George Bob El-kah-hut, Klo-kot-on, Lan-dish, Kitchen, and Jim-too-wah, of the *Quans-sake-nah, Klen-nah-hah, and Ke-ah-mas-e-ton bands of Nas-o-mah or Co-quille* tribe; Tag-o-ne-cia, Loo-ney, Yon, and Jim, of the *Ko-se-e-chah band of Too-too-to-neys;* Whiskers, Ten-as-tie, En-nach-nah, and Ta-wos-kah, of the *Se-qua-chee* band of Too-too-to-neys; An-ne-at-ta, Tal-ma-net-sa, Ko-chil-la, and Hust-la-no, of the *Too-too-to-ny band of Too-too-to-neys;* En-tlack, Too-whus-kah, Ka-tulch-kla, and No-get toe-it, of the *Chitco* tribe; Sin-whus-chan, En-san-e-klon, Empnah-wose-tah, and Yas-kah-chin-a-mah-tin, of the *Yah-shute band of Too-too-to-neys;* Nal-tah-nos-shah, Chah-hus-sah, Kos-sa-on, and E-ule-te-tes-tlah, of the *Whis-to-natin band of Too-too-to-neys;* Ses-tel-tuh, Yot-sa, and Hus-to-mah-say, of the *Cos-sa-to-ny band of Too-too-to-neys;* Mosquot, No-on-me-has-quah, Tuc-qua, and Cosh-nul-see,

of the *Chet-less-ing-ton band of Too-too-to-neys;* Smut-tah-ta, Too-kuas-chal-nah, Se-tah-kul, and Schal-lah, of the *Port Orford band of Too-too-to-neys;* Ah-chase, Tos-ton, Quil-see, and Yo-wolt-ma, of the *Eukie-chee band of Too-too-to-neys;* Mussle-tie and Tpo-quot, of the *Kus-so-to-ny band of Too-too-to-neys;* Non-whalt, Kloose-tla, and Eu-til-mus, of the *Kler-it-la-tel band of Too-too-to-neys;* Ult-sa-yah, Yah-sun-see, Ton-ua-nic-a-sha, Che-nu-tun, and Chris-tah-tah, of the *Te-cha-quot band of Too-too-to-neys; Tut-lel-ol-tus, En-sal-sun, Squo-che-nol-ta, Shet-nul-lus,* and Noch-nos see-yah, of the *Mack-a no-tin band of Too-too-to-neys;* Washington Tom, Chi-a-le-tin, Tie, Ni-ich-lo-sis, Tu-si-wah, Jackson, and David, of the *Cah-toch, Chin-chen-ten-tah-ta, Whis-ton, and Klen-hos-tun bands of Coquilles.*

ARTICLE 1. The above-named confederate bands of Indians cede to the United States all their right, title, and interest to all and every part of the country claimed by them included in the following boundaries, to wit: Commencing in the middle of the channel of the Columbia River, at the northwestern extremity of the purchase made of the Calapooia and Molalla bands of Indians; thence running southerly with that boundary to the southwestern point of that purchase, and thence along the summit of the Coast Range of mountains with the western boundaries of the purchase made of the Umpquas and Molallas of the Umpqua Valley, and of the Scotons, Chastes, and Grave Creeks of Rogue River Valley, to the southern boundary of Oregon Territory; thence west to the Pacific Ocean, thence northerly along said ocean to the middle of the north-
11 ern channel of the Columbia River; thence following the middle of said channel to the place of beginning: Provided, however, That so much of the country described above as is contained in the following boundaries shall until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and such other bands or parts of bands as may, by direction of the President of the United States, be located thereon.

Such tract for the purpose contemplated shall be held and regarded as an Indian reservation, to wit: Commencing where the northern boundary of the seventeenth range of townships south of the base line strikes the coast; thence east to the western boundary of the eighth range of townships west of the Willamette meridian, as indicated by John B. Preston's "Diagram of a portion of Oregon Territory;" thence north on that line to the southern boundary of the third range of townships south of the base line; thence west to the Pacific Ocean; and thence southerly along the coast to the place of beginning: Provided, however, That the district west of the said eighth range of townships, between the said northern boundary of range seventeen and the

fourth standard parallel south, shall, for the term of twenty years, be held and regarded as a part of said Indian reservation, and together with the tract described by this section, as such, be subject to the laws regulating "trade and intercourse with Indian tribes" now in force, or hereafter enacted by the Congress of the United States. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use of such Indians as are, or may hereafter be, located thereon; nor shall any person other than an Indian be permitted to reside upon the same without the consent and permission of the Superintendent of Indian Affairs and the agent having charge of said district.

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this convention without any additional expense to the Government other than is provided by this treaty; and until the expiration of the time specified the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all
12 white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, or actually enclosed by said Indians; Provided, however, That, when the public interest or convenience may require, the right of constructing roads, railroads, or other public highways, and navigating the streams or bays in said reservation, is hereby secured to the United States; And provided also, That if any band or bands of Indians residing in and claiming any portion of the country herein described shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several annuities and other payments hereinafter named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid as consideration and payment in full for the tracts in said country claimed by them; And provided also, That where substantial improvements have been made by individuals of bands becoming parties to this treaty which they shall be compelled to abandon in consequence of said treaty, the same shall be valued under direction of the President of the United States, and payment made said individuals therefor, or, in lieu thereof, improvements of an equal extent and value, at their option, shall be made on the tracts assigned to each respectively.

ARTICLE 2. In consideration of and payment for the country hereby ceded, the United States agree to pay to the bands and tribes of Indians claiming territory and residing in said country

the several sums of money, to wit: Ten thousand dollars per annum for the first three years, commencing on or before the first day of September 1857; eight thousand dollars per annum for the term of three years next succeeding the first three; six thousand dollars per annum for the term of three years next succeeding the second three, and three thousand dollars per annum for the term of six years next succeeding the third three.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to
13 time, at his discretion, determine what proportion thereof shall be expended for such objects as, in his judgment, will promote their well-being and advance them in civilization; for their mutual improvement and education; for buildings, opening and fencing farms, breaking land, providing terms, stock, agricultural implements, seed, &c.; for clothing, payment of mechanics and farmers, and for arms and ammunition.

ARTICLE 3. The United States agree to pay said Indians the additional sum of thirty thousand dollars, a portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing, after the ratification thereof, and prior to their removal, such articles as may be deemed by the President essential to their wants; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, tools, and seeds; for the payment of employees, and for subsisting the Indians the first year after their removal.

ARTICLE 4. In addition to the consideration specified, the United States agree to erect at suitable points on the reservation two sawmills, two flouring mills, four schoolhouses, and two blacksmith shops, to one of which shall be attached a tin shop; and for two sawyers, two millers, one superintendent of farming operations, three farmers, one physician, four school-teachers, and two blacksmiths, a dwelling house and the necessary outbuildings for each; and to purchase and keep in repair, for the time specified for furnishing employes, all necessary mill fixtures, mechanical tools, medicines, books, and stationery for schools, and furniture for employes.

The United States further engage to secure and pay for the services and subsistence for the term of fifteen years, of three farmers, two blacksmiths, two sawyers, two millers; and for the term of twenty years, of one physician, one superintendent of farming operations, and four school-teachers.

The United States also engage to retain in the service one Indian agent, and to erect at the most central suitable point agency buildings, where such agent shall reside.

14 ARTICLE 5. The half-breeds, legal representatives of the bands and tribes being parties to this treaty, who reside outside of the reservation shall be allowed to draw the share of annuity payments to which they may be entitled, either in cash or goods, at their option; and when residing upon the reservation they shall be entitled to all the benefit of annuity as well as other payments; but no half-breed shall be permitted to reside upon said reservation without the concurrent consent of the superintendent and agent.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for these Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege and locate thereon permanently; to a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres for each additional three members. And the President may provide such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon; and he may at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which condition shall continue in force until a State constitution, embracing such lands within its limits, shall have been formed, and the legislature of the State shall remove the restriction; Provided, however, That no State legislature shall remove the restriction herein provided for without the consent of Congress; And provided also, That if any person or family shall at any time neglect or refuse to occupy or till a portion of the land assigned, and on which they have located, or shall roam from place to place, indicating

15 a desire to abandon said home, the President may, if the patent shall have been issued, revoke the same, and if not issued, cancel the assignment; and may also withhold from such person or family their portion of the annuities or other money due

them, until they shall have returned to such permanent home and resumed the pursuits of industry; and in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation.

ARTICLE 7. The annuities of the Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned; or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians, except in self-defense, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents, for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the case of depredations against citizens.

ARTICLE 9. For the purpose of establishing uniformity of laws, rules, and regulations among the various bands of Indians being parties to this treaty, and to give greater security to person and property, it is hereby agreed that the Congress of the United States, with the approval of the President, shall have power to enact laws for the government of said Indians.

ARTICLE 10. In order to prevent the evils of intemperance among said Indians, it is hereby provided that if any one of them shall drink liquor to excess, or procure it for others to drink, his or
16 her proportion of the annuities may be withheld from him or her for such time as the President may determine.

ARTICLE 11. The United States agree to expend a sum of money, not exceeding ten thousand dollars, in opening and constructing wagon roads between the different settlements on said reservation, and from the saw and flouring mills herein provided for to said settlements; and in the event of a failure to effect secure landings for vessels in the transportation of annuity goods within said reservation, the additional sum, not exceeding ten thousand dollars, shall be expended by the United States in opening and constructing a wagon road from some point at or near the mouth of Ne-aches-na or Salmon River to the settlements in the Willamette Valley, and one wagon road from some navigable point of Yah-quo-nah or Alcea River to the valley of the Willamette.

ARTICLE 12. The United States engage to establish and maintain a military post on said reservation whensoever the peace and safety of the Indians residing thereon shall render the same necessary.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Joel Palmer, on the part of the United States and the undersigned chiefs, headmen, and delegates of the said confederated bands, have hereunto set their hands and seals this eleventh day of August, eighteen hundred and fifty-five.

Signed in presence of Cris. Taylor, Secretary to Treaty. W. W. Raymond, Sub-Indian Agent. R. W. Dunbar. B. M. Palmer.

Joel Palmer, (L. S.) Superintendent of Indian Affairs, Oregon Territory.

Loni, second chief, his x mark [L. S.]
Cal-he-na, his x mark [L. S.]
Tel-kite, his x mark [L. S.]
Albert, his x mark [L. S.]
Ki-hosi, first chief, his x mark [L. S.]
Sme-ka-hite, his x mark [L. S.]
Quink Ouse, his x mark [L. S.]
Kos-kup, his x mark [L. S.]
Que-mals, his x mark [L. S.]
He-a-kah, his x mark [L. S.]
17 Sam-may, his x mark [L. S.]
Ke-etch, his x mark [L. S.]
John, his x mark [L. S.]
Jim Selitsa, his x mark [L. S.]
Kle-lek, his x mark [L. S.]
Pah-hi, his x mark [L. S.]
Ha-ake, his x mark [L. S.]
Que-e-to, his x mark [L. S.]
Que-lis-ke, his x mark [L. S.]
Quo-ap-pa, his x mark [L. S.]
Jim, his x mark [L. S.]

Conchu, his x mark [L. S.]
Toch-alie, his x mark [L. S.]
Pah-ni-ka-u, his x mark [L. S.]
Wo-cos-konts, his x mark [L. S.]
Tlate-hal, his x mark [L. S.]
Sis-nah-quo-lin, his x mark [L. S.]
Scho-jo, his x mark [L. S.]
Kle-con-outs, his x mark [L. S.]
Ton-ton, his x mark [L. S.]
Touched, his x mark [L. S.]
To-cot-so, his x mark [L. S.]
Jake, his x mark [L. S.]
Chah-quo-lah, his x mark [L. S.]
Chin-ni-co-wash, his x mark [L. S.]
Tu-e-uch, his x mark [L. S.]
Ah-sis-less, his x mark [L. S.]
Lu-con-in, his x mark [L. S.]
Is-han-na, his x mark [L. S.]
Yet-sit, his x mark [L. S.]
John, his x mark [L. S.]

We, the chiefs, headmen, and delegates of the Sueslan and Winchester Bay bands of the Kal-e-wat-set or Umpqua tribe of Indians, and the several bands of Kowes Bay Indians, after having had fully explained to us the above treaty, do hereby accede to its provisions, and affix our signatures, or marks, this 17th day of August, 1855.

Signed in the presence of Cris. Taylor, Secretary; R. B. Metcalfe, Sub-Indian Agent; E. P. Drew, Sub-Indian Agent; Jn. B. Gagnier, Interpreter; John Fleet, Interpreter; J. C. Clark, Interpreter; R. W. Dunbar, L. P. Brown, M. H. Hill, John Gale.

Eneos, his x mark [L. S.]
De-chaum, his x mark [L. S.]
John, his x mark [L. S.]
Peter, his x mark [L. S.]
Poseal, his x mark [L. S.]
Ha-lo-teeth, his x mark [L. S.]
Kal-la-hat-sa, his x mark [L. S.]
Ha-lo-gleese, his x mark [L. S.]

Bi-chauma, his x mark [L. S.]
Louis, his x mark [L. S.]
Lake-map, his x mark [L. S.]
Jerome, his x mark [L. S.]
Peir, his x mark [L. S.]
Wilson, his x mark [L. S.]
Tom, his x mark [L. S.]
Captain, his x mark [L. S.]

Jim, his x mark [L. S.]
Tim, his x mark [L. S.]
Tom, his x mark [L. S.]
Sam, his x mark [L. S.]
Fat-tim, his x mark [L. S.]
Jim, 1st chief, his x mark [L. S.]
Bob, 2d chief, his x mark [L. S.]
John, his x mark [L. S.]
George, his x mark [L. S.]
William, his x mark [L. S.]
Charley, his x mark [L. S.]
Dock, his x mark [L. S.]
Dick, his x mark [L. S.]
Ale-man-doctor, his x mark [L. S.]
Jim 2d, his x mark [L. S.]
John, his x mark [L. S.]
Stephen, his x mark [L. S.]
Cal-loih, his x mark [L. S.]
Wal-lauch, his x mark [L. S.]
Loch-steh, his x mark [L. S.]
Wal-loch, his x mark [L. S.]
Pete, his x mark [L. S.]
Jackson, his x mark [L. S.]
Hal-lice, his x mark [L. S.]
Don-Quixotte, his x mark [L. S.]
Charly, his x mark [L. S.]
John, his x mark [L. S.]
Que-el-ma, his x mark [L. S.]
Qui-it, his x mark [L. S.]
Ha-lo-wa-wa, his x mark [L. S.]
Taylor, his x mark [L. S.]
Pe-lee-gray, his x mark [L. S.]
Joe, his x mark [L. S.]
Sam, his x mark [L. S.]

18

Charley, his x mark [L. S.]
San 2d, his x mark [L. S.]
Jim, his x mark [L. S.]
Johnson, his x mark [L. S.]
Charley 2d, his x mark [L. S.]
Oleman, his x mark [L. S.]
Jack, his x mark [L. S.]
Tom, his x mark [L. S.]
Gabriel, his x mark [L. S.]
Cris, his x mark [L. S.]
Kah-tite, his x mark [L. S.]
Ne-ah-tal-woot, his x mark [L. S.]
Jake, his x mark [L. S.]
Quin-ultchet, his x mark [L. S.]
Yat-se-no, his x mark [L. S.]
Lalkt, his x mark [L. S.]
Damon, his x mark [L. S.]
Ka-ton-na, his x mark [L. S.]
Loch-hite, his x mark [L. S.]
Ten-ach, his x mark [L. S.]
Ki-hi-ah, his x mark [L. S.]
Hon-slach, his x mark [L. S.]
Ko-ah-qua, his x mark [L. S.]
Solomon, his x mark [L. S.]
Lol-lotch, his x mark [L. S.]
Skil-a-milt, his x mark [L. S.]
Yah-who-wich, his x mark [L. S.]
Tes-ich-man, his x mark [L. S.]
Hon-nu-wot, his x mark [L. S.]
Squat-kle-ah, his x mark [L. S.]
Ki-u-ot-set, his x mark [L. S.]
Al-la-wom-mets, his x mark [L. S.]
Too-tee, his x mark [L. S.]
No-whe-na, his x mark [L. S.]

We, the chiefs, headmen, and delegates of the Quans, Sakenah, Klen-nah-hah, and Ke-ah-mas-e-ton bands of Nas-o-mah or Coquille tribe of Indians, after having had fully explained to us the above treaty, do hereby accede to its provisions, and affix our signatures or marks, this 23 day of August, 1855.

T-sin-no-nas, his x mark [L. S.]
Pil-le-klo, his x mark [L. S.]
Kias-won-ta, his x mark [L. S.]
Sat-tne, his x mark [L. S.]
Wah-hench, his x mark [L. S.]
Tom, his x mark [L. S.]
Joe, his x mark [L. S.]
Mal-a-quack, his x mark [L. S.]
Won-at-tlos, his x mark [L. S.]
Mil-luck, his x mark [L. S.]
John, his x mark [L. S.]
Charley, his x mark [L. S.]
Che-han-nah, his x mark [L. S.]
Kume-mas, his x mark [L. S.]
Tsha-san, his x mark [L. S.]
Kon-u-quan, his x mark [L. S.]
Sands, his x mark [L. S.]
T-sis-tah-noo-ka, his x mark [L. S.]
Mah-T-lose, his x mark [L. S.]
Chil-lah, his x mark [L. S.]
Hon-ouse, his x mark [L. S.]

Charles, his x mark [L. S.]
Lah-Lee, his x mark [L. S.]
Noc-to-soch, his x mark [L. S.]
O-Charley, his x mark [L. S.]
Klang-Kus, his x mark [L. S.]
Bill, his x mark [L. S.]
Other-tom, his x mark [L. S.]
Yohn, his x mark [L. S.]
Nelson, his x mark [L. S.]
Locks-ey, his x mark [L. S.]
Jo-Lane, his x mark [L. S.]

19

Frank, his x mark [L. S.]
John, his x mark [L. S.]
Jim, his x mark [L. S.]
George, his x mark [L. S.]
Bale, his x mark [L. S.]
El-kah-hus, his x mark [L. S.]
Klo-Kat-on, his mark [L. S.]
San-dish, his x mark [L. S.]
Kitchen, his x mark [L. S.]
Jim-too-Wah, his x mark [L. S.]

Signed in presence of Chris. Taylor, Secretary: John Flett, Interpreter; Jn. Bts. Gagner, Interpreter; Joseph E. Clark, Interpreter; E. P. Drew, Sub-Indian Agent; R. W. Dunbar.

We, the chiefs, headmen, and delegates of the Se-quate-sah, Kose-a-chah, Euka-che, Yah-shute, Too-too-to-ney, Mack-a-no-tin, Kos-sul-to-ny, Mussle, Cos-sa-to-ny, Klu-it-to-tel, Te-cha-quot, Chet-less-ing-ton, and Wis-tona-tin bands of Tootootony tribe and Chet-co tribe of Indians, after having had fully explained to us the above treaty, do hereby accede to its provisions, with the following proviso:

That the canoes belonging to the members of our respective bands shall either be transported to the district designated as a reservation, or other canoes or boats furnished in lieu thereof, or the value of the same paid the Indians by the Government of the United States, at the discretion of the latter, and that means of transportation for the old, infirm, and children, with goods, wares, and chatels belonging to the members of the said bands, and subsistence for members thereof during time of removal, shall also be furnished by, and at the expense of, the Government of the United States.

In witness whereof we hereunto affix our signatures, or marks, this thirtieth day of August 1855.

Sins band

Ta-Wos-Ka, his x mark [L. S.]

Too-too-to-ny

An-ne-at-ta, his x mark [L. S.]
Tal-ma-net-sa, his x mark [L. S.]
Ko-chil-lah, his x mark [L. S.]
Hurt-la-no, his x mark [L. S.]

Chet-co tribe

Eu-tiach, first chief, his x mark [L. S.]
Too-Whus-ka, his mark [L. S.]
Ka-tuleh-Kla, his x mark [L. S.]
No-get-toe-it, his x mark [L. S.]

Se-qua-a-chan

Whiskus, his mark [L. S.]
Ten-as-tle, his x mark [L. S.]
Eu-Wach-nah, his x mark [L. S.]

Port Orford band

Smut-tah-ta, his x mark [L. S.]
Too-Kus-Chol-nah, his x mark [L. S.]
Se-tah-Kue, his x mark [L. S.]
Seah-lah, his x mark [L. S.]

20 Jashuts

Sin-Whiss-Chan, his x mark [L. S.]
Eu-San-e-Klon, his x mark [L. S.]
Eu-nah-nese-tah, his x mark [L. S.]
Yas-Kat-chin-a-mah-tin, his x mark [L. S.]

Whis-to-na-tin

Nal-tah-wos-shah, his x mark [L. S.]
Chah-hus-sah, his x mark [L. S.]
Kos-sa-on, his x mark [L. S.]
E-tule-te-tes-tlah, his x mark [L. S.]

Coc-sa-to-ny

Ses-tel-tus, his x mark [L. S.]
Tat-sa, his x mark [L. S.]
Hus-to-Mah-say, his x mark [L. S.]

Chet-less-ing-ton

Mos-quot, his x mark [L. S.]
No-on-me-has-quah, his x mark [L. S.]
Tac-qua, his x mark [L. S.]
Cosh-nul-see, his x mark [L. S.]

Ko-so-e-cha band

Tag-o-ne-cia, first chief, his x mark [L. S.]
Loo-ney, his x mark [L. S.]
John, his x mark [L. S.]
Jim, his x mark [L. S.]

Euku band

Ah-Chase, his x mark [L. S.]
Tos-lon, his x mark [L. S.]
Quil-su, his x mark [L. S.]
Yo-Walt-Ma, his x mark [L. S.]

Kos-sul-to-ny

Mussles-Tie, his x mark [L. S.]
Too-Quot, his x mark [L. S.]

Klu-it-ta-tel

Non-Wholt, his x mark [L. S.]
Koose-tia, his x mark [L. S.]
Eu-til-Mus, his x mark [L. S.]

Te-cha-quot

Ult-sa-yah, his x mark [L. S.]
Yah-sun-su, his x mark [L. S.]
Ton-wa-nec-a-she, his x mark [L.S.]
Che-nun-tun, his x mark [L. S.]
Chis-tah-tah, his x mark [L. S.]

Mack-a-no-tin

Tut-tel-ol-tus, his x mark [L. S.]
Eu-Sol-Sun, his x mark [L. S.]
Squo-che-nol-la, his x mark [L. S.]
Shet-nul-lus, his x mark [L. S.]
Nech-was-su-yar, his x mark [L. S.]

Signed in the presence of Cris. Taylor, Secretary; Jery McGire, R. W. Dunbar, August V. Kautz, 2d Lieut. 4th Infantry; Dr. R. Glisan, U. S. A; E. P. Drew, John Flett, J. E. Clark.

We, the chiefs, headmen, and delegates of the Cah-toch-say, Chin-chen-ten-tah-ta, Whis-ton, and Klen-hos-tun bands of Coquille tribe of Indians, after having had fully explained to us the above treaty do hereby accede to its provisions and affix our signatures or marks, this 8th day of September, 1855.

Washington, his x mark [L. S.]
Tom, his x mark [L. S.]
Chi-a-le-tin-tie, his x mark [L. S.]
Ni-ich-lo-sis, his x mark [L. S.]
Tu-si-uah, his x mark [L. S.]
Jackson, his x mark [L. S.]
David, his x mark [L. S.]

21 Signed in the presence of Cris. Taylor, Secretary; August V. Kautz, 2d Lieut. 4th Infantry; R. W. Dunbar; John Flett, Interpreter; Henry Hill Woodward.

IX

That anticipating the ratification thereof on the 9th day of November, 1855, the President of the United States set aside what was known as the Coast Reservation by executive order which executive order and letters referred to therein were as follows:

"General Land Office,
September 10, 1855.

To the Hon. James Campbell, Acting Secretary of the Interior.

Sir: I have the honor to submit herewith two letters from the Acting Commissioner of Indian Affairs of the 29th June last and the 6th instant, recommending a large reservation of land, for the Coast Umpqua and Willamette Tribes of Indians in Oregon

Territory, as shown by the blue shaded lines and the enclosed diagram marked A taken from the general map received with the Acting Commissioner's letter of the 6th instant embracing as will be seen, about 100 miles of the Pacific coast from "Cape Look Out" to a point midway between the Umpqua and Sinslaw (Sciisticim) rivers, by an average depth of 20 miles.

Previous to issuing the instructions requested by the Acting Commissioner I respectfully recommend that the order of the President be first obtained for the proposed reservation.

I am

Very respectfully, Your obd. servant,

(Sgd.) THOS. A. HENDRICK,
Commissioner."

22 "DEPARTMENT OF INTERIOR,
November 8, 1855.

SIR: I herewith submit for your approval a proposed reservation for Indians on the coast of Oregon Territory recommended by the Commissioner of Indian Affairs and submitted to the Department by the Commissioner of the General Land Office for the procurement of your order on the subject in letter of the 10th September last.

Before submitting the matter to you I desired to have a full report of the subject from the Indian Office and the letter of the head of that Bureau of the 29th ultimo having been received and considered I see no objection to the conditional reservation asked for subject to future curtailment if found proper or entire relief thereof should Congress not sanction the object rendering this withdrawal of the land from white settlement at this time advisable. A plat marked A and indicating the boundaries of the reservation accompanies the papers and has prepared thereon the necessary order for your signature should you think fit to sanction the reservation.

I have the honor to be

Very respectfully, Your obd servant,

(Sgd.) R. MCCLELLAND,
Secretary.

The PRESIDENT."

"NOVEMBER 9, 1855.

"The reservation of the land within the blue shaded lines is hereby made for the purposes indicated in the letter of the Commissioner of the General Land Office of the 10th September last and letter of the Secretary of the Interior of the 8th November 1855.

FRANKLIN PIERCE."

That said executive order of the President which limited the reservation "for the purposes indicated thereby" made the

reservation for the "Coast, Umpqua and Willamette
23 tribes." That said Coast Reservation consisted of a wide strip of land between the summit of the coast range of mountains and the Oregon coast lying immediately south of Cape Lookout and marked on page 51 of a map in Royce's Indian Land Cession of the United States as Parcels 578, 579, 479 and 578 (repeated for a lower tract) which descriptions are by reference hereto made a part hereof. That the boundaries were approximately that of the reservation set out in said unratified treaty.

X

That the lands of the Tillamooks herein described lay almost wholly within the confines of said reservation and said lands were taken by the Defendant by virtue of said executive order.

That the lands of the Coquilles and Too-too-to-neys were wholly outside said reservation and such lands were taken by inducing and coercing said Indians to move from their own lands on to said reservation upon the promise that said treaty would be ratified and the terms carried out.

After the said treaty had been signed and without awaiting the ratification thereof the United States by various Acts of Congress and Executive Orders and acts of physical dispossession took over the entire control of said lands of the Coquilles and Too-too-to-neys together with two hundred billion feet of timber, valuable minerals and fishing rights contrary to the said plaintiffs' right by immemorial occupancy to the said lands and without their consent and against their will and without any consideration appropriated the said land, timber, minerals and fishing rights for the use and benefit of the Government of the United States. Said land, timber, minerals and fishing rights at the dates taken by defendant were of great value, to-wit, $5,000,000 for each tract.

24 That said Acts of Congress, executive orders and other acts of dispossession by defendant opened up said lands for settlement, authorized patents and land grants by which persons other than said Indians were put into possession thereof to the exclusion of plaintiffs.

That rights acquired by said plaintiffs by virtue of reservations set aside for them by executive orders and Acts of Congress were violated by subsequent executive orders and Acts of Congress.

That the said plaintiffs became and were the owners of the lands embraced in said reservations and said defendant appropriated said lands and without their consent and against their will and without any consideration appropriated the said land, timber, minerals and fishing rights for the use and benefit of the Government of the United States.

XI

That said plaintiffs were Coast tribes and when said reservation was set apart for Coast, Umpqua and Willamette tribes they became entitled jointly with such other Indians therein named to its lands for a reservation to the exclusion of Indians not therein named.

That defendant violated their said rights in said reservation to their great damage by placing Rogue River, Chasta and other Indians not included in the terms of said reservation and by taking the lands as hereinafter described.

XII

That by executive order of December 21, 1865, the defendant took away from said Indians without authority of law to their great damage said tract No. 479. That by Act of Congress March 3, 1875 (18 Stat. 420) the defendant took away said two tracts each No. 578, leaving only tract No. 578.

25 Under Act of February 8, 1874 (24 Stat. 388) a portion of the diminished reservation was allotted in severalty to certain Indians.

That by agreement of October 31, 1892 as ratified by the Act of August 15, 1894, 28 Stat. 286, 323, which did not embrace all the plaintiff Indians, the unallotted lands of the diminished reserve, excepting five sections of land, were ceded to and taken over by defendant.

Under the Act of May 13, 1910, 36 Stat. 367, defendant unlawfully disposed of said sections of land.

XIII

That all of said tribes including bands and tribes having entered into no treaty ratified or unratified claim damages because of violations of agreements, Acts of Congress and executive orders and because of Acts of Congress and executive orders and acts of dispossession, relating to realty, personal property, rights of possession, rights to minerals, timber rights, fishing and hunting rights.

XIV

Plaintiffs have not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States but have actively aided and assisted the United States in its prosecution of campaigns against other hostile Indian tribes supplying the United States army with numerous scouts and soldiers.

XV

Plaintiffs have not heretofore submitted any claim against the United States to this Court nor in any Court of the United States based upon the subject matter of this suit.

26 XVI

The Siletz Confederated Tribes of Indians and the Willamette Valley Confederated Tribes of Indians have been included as parties plaintiff for the reason that certain members of various bands or tribes mentioned in the first paragraph of this petition have so confederated and are sometimes so designated. The Confederated Tribes of the Grande Ronde Community, Oregon are made parties hereto because they are organized by Constitution under the Act of June 18, 1934 and are authorized by such Act to bring and prosecute actions at law.

XVII

Wherefore, by reason of the premises aforesaid, plaintiffs sue the United States and pray that this Honorable Court will render judgment for damages in the amount of $9,500,000.00, and such additional amounts as will fairly compensate plaintiffs for each and all of the said violations by the defendant of the rights of the plaintiffs and for such further relief including interest as may to the Court seem proper.

EVERETT SANDERS,
Shoreham Building, Washington, D. C.,
JOHN G. MULLEN,
E. L. CRAWFORD,
Attorneys for Plaintiffs.

L. A. GRAVELLE,
DOUGLAS WHITLOCK,
Of Counsel.

27 [*Duly sworn to by Everett Sanders; jurat omitted in printing.*]

29 *General traverse to the second amended petition*

Filed April 27, 1943

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the second amended petition be dismissed.

NORMAN M. LITTELL,
Assistant Attorney General.

Argument and submission of case

November 5, 1943

On November 5, 1943, the case was argued and submitted on merits by Mr. Everett Sanders for plaintiff, and by Mr. Charles E. Small for defendant.

31 *Special findings of fact, conclusion of law and opinion of the court by Littleton, Judge.*

Filed April 2, 1945

Mr. Everett Sanders for plaintiffs.

Mr. John G. Mullen, Mr. E. L. Crawford, Mr. L. A. Gravelle, Mr. Douglas Whitlock, and *Mr. Edward F. Howrey* were on the brief.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell,* for defendant.

Mr. Raymond T. Nagle was on the brief.

32 Plaintiffs bring this suit under clause (b) of the special jurisdictional act, hereinafter mentioned, to recover compensation for certain lands on the coast of Oregon to which certain of plaintiff tribes who were parties to an unratified treaty dated August 11, 1855 claim they had original Indian title through exclusive possession and occupancy from time immemorial, which lands were taken in 1855 and subsequently by the United States without payment of just compensation.

The provision of the jurisdictional act under which this suit is brought authorizes the bringing of suit and the entry of judgment for compensation if the claim of original Indian title by occupancy at and long prior to the date of the unratified treaty of August 11, 1855 is established.

It is admitted by defendant that certain plaintiff tribes and bands who were parties to the unratified treaty of 1855 were moved off and deprived of the use and occupancy of the lands which they claimed in 1855 and were placed on certain land, a portion of which was and is claimed by the Tillamooks Tribe. This land consisted of a reservation carved out of the entire area described in said treaty of 1855 as being ceded, but it is contended by defendant that such of plaintiff tribes or bands who were parties to the unratified treaty of 1855 whose lands were included in the terms thereof are not entitled to recover compensation. It is insisted

(1) That the tribes and bands who are entitled under the terms of the jurisdictional act to maintain this suit have not proven by sufficient evidence that they exclusively occupied and used the area for which they now claim compensation, or any definite part thereof, at and long prior to 1855.

(2) That they cannot recover on the basis of original title, claim, or rights in, to, or upon the whole or any part of the lands for which they make claim in the absence of a showing of prior recognition or approval by Congress as against the sovereign rights of the United States of such original Indian title, which title, it is contended, was never recognized by Congress as to these plaintiffs, or any of them; and

(3) That certain of the tribes and bands made plaintiffs herein were not parties to the treaty of 1855, and that
33 certain of the tribes and bands, made plaintiffs in the petition, who were parties to certain unratified treaties made in 1851 have been paid by Congress under the acts of June 7, 1897 and August 24, 1912 in full for their claims in respect of the lands which they claimed had been taken.

Counsel also contend that the "Coast Reservation", consisting of about 1,100,000 acres as created by an Executive Order of November 9, 1855, was a conditional reservation for Indian purposes through a withdrawal of lands from public use and settlement and not a permanent Indian reservation, as originally created, for the sole and exclusive use and occupancy of any of plaintiff tribes or other Indians through a ratified treaty, agreement, or act of Congress, such as would give any of plaintiffs beneficial ownership thereto, for their exclusive occupancy and use, and render the United States liable for compensation as a result of subsequent reductions or diminution of the temporary reservation so created.

Plaintiffs, the Tillamook, Coquille, Too-too-to-ney, and the Chetco tribes who were parties to the unratified treaty of August 11, 1855, who have never been paid and who are entitled to maitain this suit under clause (b) of the jurisdictional act, insist that they have established original Indian title through exclusive use and occupancy of the lands within areas herein claimed by them, which lands were included in the total area described in the unratified treaty of 1855. They further insist that no specific act of Congress directly recognizing their original Indian title is necessary to be shown as a condition to their right to recover under the terms of the jurisdictional act, and that the United States under its long-established Indian policy adopted by Congress had, long prior to 1855, and did then recognize such original Indian

title and rights in lands used and exclusively occupied by the Indian tribes, including plaintiffs, and that such original Indian title of these particular plaintiffs was never legally extinguished; they, therefore, insist that they are entitled to just compensation under the jurisdictional act for the lands to which they had original use and occupancy title which, they contend, were taken by the Government in 1855.

34 The only question now before the court is the legal and equitable right of plaintiffs under the provisions of the jurisdictional act and the evidence to recover compensation (1) on the basis of original Indian title for the lands claimed, and (2) on the basis of alleged exclusive use and occupancy rights in and to certain portions of the land originally included within the "Coast Reservation;" the amount of recovery and the amount of offsets, if any, being reserved for further proceedings under rule 39 (a).

Special findings of fact

1. Clause (b) of the special jurisdictional act under which this suit was brought confers upon this court jurisdiction to hear, adjudicate, and render final judgment in and upon "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described" in the unratified treaty of August 11, 1855, "at and long prior to the dates thereof." Certain tribes, which also signed this unratified treaty of 1855, but which are not parties to this suit, were expressly excluded by the jurisdictional act because separate provisions had been made by Congress with respect to their claims. The Indians so excluded were the Coos Bay, Lower Umpqua, and Siuslaw tribes. Certain other tribes and bands made plaintiffs in the petition herein who were not parties to the unratified treaty of 1855, and who the defendant contends are not entitled to maintain suit or to recover under the terms of the jurisdictional act, will be referred to hereinafter.

2. March 3, 1847 (9 Stat. 203), Congress passed an act to amend the act of June 30, 1834 (4 Stat. 735), "for the organization of the Department of Indian Affairs," and to amend an act of the same date (4 Stat. 729) "to regulate trade and

intercourse with the Indian tribes." in section 1 of which act of 1847 it was provided "That the limits of each superintendency, agency, and subagency shall be established by the Secretary of War, either by tribes or geographical boundaries; and the superintendents, agents, and subagents shall be furnished with offices for the transaction of the public business, and the agents and subagents with houses for their residences, at the expense of the United States * * *." By the act of August 14, 1848 (9 Stat. 323) Congress created the territory of Oregon, within the area of which lived various Indian tribes in addition to plaintiff tribes and bands, and there was inserted in sec. 1 of that act, the provision that nothing therein contained "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed." This provision was made applicable to all territories and territorial governments which embraced Indians (R. S. 1839, 1840).

June 5, 1850 (9 Stat. 437), Congress passed an act entitled "An act authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for other purposes." Sec. 1 of this act authorized the President to appoint one or more commissioners to negotiate treaties with the several tribes for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if practicable, for their removal east of said mountains. The President was also directed to obtain their assent and submission "to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories * * *." Sec. 2 authorized the appointment, by and with the advice and consent of the Senate, of a superintendent of Indian Affairs for the Territory of Oregon to exercise a general superin-

tendence over all Indians in Oregon and to exercise and perform all powers and duties assigned by law to other Indian superintendents. Sec. 4 authorized the President, by and with the advice and consent of the Senate, to
36 appoint one or more Indian agents, not exceeding three, to perform all the duties as its agent to such tribe or tribes as should be assigned to him by the superintendent at the direction of the President. Sec. 5 provided "That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon." Sec. 6 appropriated $25,000 to carry into effect the provisions of the act. Subsequent appropriations were made from time to time to carry out the provisions of the act and, also, for expenses of negotiating and making treaties with the Oregon Indians for extinguishment of their claims to lands.

The superintendent and agents were forthwith appointed. Anson Dart was appointed Indian superintendent and was later succeeded by General Joel Palmer. Thereafter, under authority, direction, and instructions of the Congress and the President, Dart and Palmer negotiated various treaties in 1851 and subsequently with various tribes and bands of Indians in Oregon, including the unratified treaty of August 11, 1855 made by General Palmer with certain of plaintiff tribes and bands for extinguishment of original Indian title to lands claimed and occupied by them. The Indian tribes, parties to this treaty of 1855, were the tribes and bands of Tillamooks, the Sinslaw or Siuslaw, the Umpqua, the Kowes Bay or Coos Bay, the Coquille or Nas-o-mah, the Too-too-to-ney, and the Chetco.

Prior to the negotiation and signing of the treaty of August 11, 1855, nineteen separate treaties had been negotiated and made in 1851 with various tribes and bands of Indians, including the Tillamook (North), not plaintiff Tillamooks tribe; the Clatsop (plaintiff herein); the Neha-lum (plaintiff herein), and various bands of the Chinook tribe (also a plaintiff herein).

Six other treaties were negotiated, made, and signed in 1853, 1854, and 1855 by Commissioner Anson Dart or by Gen. Palmer, assisted by the Indian agents, with the various

tribes and bands named therein, for extinguishment of Indian claims of original Indian tities. These six treaties referred to in clause (a) of the jurisdictional act were
37 ratified. None of the claims made in this suit is directly based on those treaties.

The unratified treaty of August 11, 1855, with which we are here concerned and which, as hereinafter stated, was not submitted to the Senate until February 11, 1857, was not rejected by the Senate but was simply not reported out by the Committee on Indian Affairs to which it had been referred. Apparently the reason this treaty of August 11, 1855, and certain treaties made with various tribes and bands in 1851 were not reported out by the Senate Committee for action by the Senate was because the August 11, 1855, treaty described the land to be ceded as overlapping at the north portion certain land claimed by the North Tillamooks, Chinook, Clatsop, and Ne-ha-lum tribes who did not sign the 1855 treaty and with whom a separate treaty in 1851 had been negotiated and signed; and, also, because certain other treaties negotiated and signed in 1851 with certain other tribes and bands were in effect superseded by subsequent treaties made with some of the same tribes and bands in 1853, 1854, and 1855, which subsequent treaties had been ratified.

Seven of the tribes and bands with whom treaties had been made in 1851, but which were not ratified, and with which tribes no subsequent treaty was made and ratified, were, by the acts of June 7, 1897, 30 Stat. 62, and August 24, 1912, 37 Stat. 518, 535, paid for their claims to lands of which they had been deprived as a result of the nonratification of the 1851 treaties with them. These particular lands had been described in seven separate unratified treaties, and the amounts so paid by these acts of Congress were, pursuant to the provisions of the acts, accepted by said tribes and bands in full satisfaction of all claims for the lands described in and ceded by said 1851 unratified treaties. The other twelve tribes and bands with whom treaties were made in 1851, but not ratified, appear to have been included in other treaties negotiated, made, and ratified, as above mentioned, in 1853, 1854, and 1855.

The seven tribes and bands whose treaties of 1851 were not ratified and who were not included in other ratified treaties were as follows:

38

Tribe	Date of Treaty in 1851
Clatsop tribe	August 5
North Tillamook tribe, including the Ne-ha-lum tribe (not plaintiff Tillamooks)	" 7
Nuc-quee-clah-we-muck band of Chinook tribe	" 7
Kathlamet band of Chinook tribe	" 9
Waukikum " " " "	" 8
Wheelappa " " " "	" 9
Lower " " " "	" 9

3. Congress enacted provisions from time to time and made various appropriations to carry out and fulfill ratified treaties made by Anson Dart, Gen. Palmer, and others with various tribes of Oregon Indians (some of whom are plaintiffs herein) for the extinguishment by cession to the United States of their claims of original use and occupancy title to lands. Some of those ratified treaties were (1) Treaty of September 10, 1853 (10 Stat. 1018), with the Rogue River Tribe; (2) Treaty of September 19, 1853 (10 Stat. 1027), with the Umpqua Tribe; (3) Treaty of November 18, 1854 (10 Stat. 1122), with the Chasta tribe, the Scotons tribe, and the Grave Creek band of Umpquas; (4) Treaty of November 29, 1854 (10 Stat. 1125), with "the confederated bands of the Umpqua tribe of Indians and of the Calapooias residing in Umpqua Valley"; (5) Treaty of January 22, 1855 (10 Stat. 1143), with "the confederated bands of Indians residing in the Willamette Valley"; and (6) Treaty of December 21, 1855 (12 Stat. 981), with the "Mo-lal-la-las, or Molel tribe of Indians."

None of the unratified treaties mentioned in finding 2, made in 1851, including those made in that year with the seven bands and tribes who were paid in full, as above-mentioned, and none of the above-mentioned six ratified treaties included, as ceded land, any of the land for which compensation is claimed in the petition herein by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos.

All the above-mentioned ratified treaties except the sixth had been made and ratified before the treaty of August 11, 1855, with which we are here concerned, was transmitted by

the President to the Senate and before the President issued the Executive Order of November 9, 1855, hereinafter
39 mentioned, conditionally creating the Coast Reservation in part out of certain lands involved in this case and ceded under the August 11, 1855 unratified treaty. The reservation was created, subject to future curtailment if the President should deem proper, for the Indian tribes and bands party to the 1855 treaty and other tribes and bands which the President might place upon said reservation.

As hereinafter mentioned, it appears that some of the Indians of some of the above-mentioned tribes and bands whose treaties were ratified were subsequently removed to and placed upon the reservation described in the Executive Order of November 9, 1855, notwithstanding the treaty of August 11, 1855 with the Indians, who claimed and held original Indian title to such lands had not been ratified, and such original Indian title had not been legally extinguished.

Gen. Palmer, assisted by the Government Indian agents, made investigations and reports as to the lands and areas thereof claimed, occupied, and used by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos, parties to the unratified treaty of August 11, 1855. Plaintiff tribes and bands, except those mentioned in finding 5, signed and accepted this treaty dated August 11, 1855 on August 11, August 17, August 23, August 30 and September 8, 1855; because of these different dates of signing by the different tribes, the jurisdictional act referred to the 1855 treaty as "treaties." So far as here material, the unratified treaty of August 11, 1855, was as follows:

> ARTICLE 1. The above-named confederated bands of Indians cede to the United States all their right, title, and interest to all and every part of the country claimed by them included in the following boundaries, to wit: Commencing in the middle of the channel of the Columbia River, at the northwestern extremity of the purchase made of the Calapooia and Molalla bands of Indians; thence running southerly with that boundary to the southwestern point of that purchase, and thence along the summit of the Coast Range of mountains with the western boundaries of the purchase made of the Umpquas and Molallas of the Umpqua Valley, and of the Scotons, Chastes, and Grave Creeks of Rogue River Valley, to the southern boundary of Oregon Territory; thence west to the Pacific Ocean, thence northerly

40 along said ocean to the middle of the northern channel of the Columbia River; thence following the middle of said channel to the place of beginning: *Provided, however*, That so much of the country described above as is contained in the following boundaries shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and such other bands or parts of bands as may, by direction of the President of the United States, be located thereon.

Such tract for the purpose contemplated shall be held and regarded as an Indian reservation, to wit: Commencing where the northern boundary of the seventeenth range of townships south of the base line strikes the coast; thence east to the western boundary of the eighth range of townships west of the Willamette meridian, as indicated by John B. Preston's "Diagram of a portion of Oregon Territory;" thence north on that line to the southern boundary of the third range of townships south of the base line; thence west to the Pacific Ocean; and thence southerly along the coast to the place of beginning: *Provided, however*, That the district west of the said eighth range of townships, between the said northern boundary of range seventeen and the fourth standard parallel south, shall, for the term of twenty years, be held and regarded as a part of said Indian reservation, and together with the tract described by this section, as such, be subject to the laws regulating "trade and intercourse with Indian tribes" now in force, or hereafter enacted by the Congress of the United States. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use of such Indians as are, or may hereafter be, located thereon; nor shall any person other than an Indian be permitted to reside upon the same without the consent and permission of the Superintendent of Indian Affairs and the agent having charge of said district.

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this convention without any additional expense to the Government other than is provided by this treaty; and until the expiration of the time specified the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, or actually enclosed by said Indians; *Provided, however*, That, when the public interest or convenience may require, the
41 right of constructing roads, railroads, or other

public highways, and navigating the streams or bays in said reservation, is hereby secured to the United States; *And provided also*, That if any band or bands of Indians residing in and claiming any portion of the country herein described shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several annuities and other payments hereinafter named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid as consideration and payment in full for the tracts in said country claimed by them; *And provided also*, That where substantial improvements have been made by individuals of bands becoming parties to this treaty which they shall be compelled to abandon in consequence of said treaty, the same shall be valued under direction of the President of the United States, and payment made said individuals therefor, or, in lieu thereof, improvements of an equal extent and value, at their option, shall be made on the tracts assigned to each respectively.

ARTICLE 2. In consideration of and payment for the country hereby ceded, the United States agree to pay to the bands and tribes of Indians claiming territory and residing in said country the several sums of money, to wit: Ten thousand dollars per annum for the first three years, commencing on or before the first day of September, 1857; eight thousand dollars per annum for the term of three years next succeeding the first three; six thousand dollars per annum for the term of three years next succeeding the second three, and three thousand dollars per annum for the term of six years next succeeding the third three.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to time, at his discretion, determine what proportion thereof shall be expended for such objects as, in his judgment, will promote their well-being and advance them in civilization; for their mutual improvement and education; for buildings, opening and fencing farms, breaking land, providing teams, stock, agricultural implements, seed, &c., for clothing, payment of mechanics and farmers, and for arms and ammunition.

ARTICLE 3. The United States agree to pay said Indians the additional sum of thirty thousand dollars, a portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing,

42

after the ratification thereof, and prior to their removal, such articles as may be deemed by the President essential to their wants; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, tools, and seeds; for the payment of employes, and for subsisting the Indians the first year after their removal.

ARTICLE 4. In addition to the consideration specified, the United States agree to erect at suitable points on the reservation two sawmills, two flouring mills, four schoolhouses, and two blacksmith shops, to one of which shall be attached a tin shop; and for two sawyers, two millers, one superintendent of farming operations, three farmers, one physician, four school teachers, and two blacksmiths, a dwelling house and the necessary outbuildings for each; and to purchase and keep in repair, for the time specified for furnishing employes, all necessary mill fixtures, mechanical tools, medicines, books, and stationery for schools, and furniture for employes.

The United States further engage to secure and pay for the services and subsistence for the term of fifteen years, of three farmers, two blacksmiths, two sawyers, two millers; and for the term of twenty years, of one physician, one superintendent of farming operations, and four school teachers.

The United States also engage to retain in the service one Indian agent, and to erect at the most central suitable point agency buildings, where such agent shall reside.

ARTICLE 8. The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned; or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians, except in self-defense, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents, for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail
43 as that prescribed in the case of depredations against citizens.

ARTICLE 9. For the purpose of establishing uniformity of laws, rules, and regulations among the various bands of Indians being parties to this treaty, and to give greater security to person and property, it is hereby

agreed that the Congress of the United States, with the approval of the President, shall have power to enact laws for the government of said Indians.

ARTICLE 11. The United States agree to expend a sum of money, not exceeding ten thousand dollars, in opening and constructing wagon roads between the different settlements on said reservation, and from the saw and flouring mills herein provided for to said settlements; and in the event of a failure to effect secure landings for vessels in the transportation of annuity goods within said reservation, the additional sum, not exceeding ten thousand dollars, shall be expended by the United States in opening and constructing a wagon road from some point at or near the mouth of Ne-aches-na or Salmon River to the settlements in the Willamette Valley, and one wagon road from some navigable point on Yah-quo-nah or Alcea River to the valley of the Willamette.

ARTICLE 12. The United States engage to establish and maintain a military post on said reservation whensoever the peace and safety of the Indians residing thereon shall render the same necessary.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

4. Plaintiff tribes and bands (except the plaintiffs Chinook, Clatsop, and the Ne-ha-lum tribes, the Confederated tribes of the Grand Ronde Community, Oregon, so-named, Willamette Valley Confederated tribes of Indians, so-named, and the Siletz Confederated tribes, so-named) were parties signatory to the unratified treaty above set out and signed by the chiefs and headsmen of the tribes and bands as set out therein, respectively. The treaty was signed by Joel Palmer, duly authorized by the President of the United States on behalf of the Government of the United States. It was forwarded to the office of the Commissioner of Indian Affairs, Interior Department, by Superintendent Palmer on November 14, 1855, but was not transmitted by the
44 Commissioner of Indian Affairs to the Secretary of the Interior for submission to the President until February 5, 1857. The reason for this delay from November 14, 1855, to February 5, 1857, was that this treaty of August 11, 1855, with numerous other treaties negotiated and made with the various tribes and bands of Indians in Oregon, was received by the Commissioner of Indian Affairs during a recess

of Congress—which treaties were afterwards withheld by the Commissioner of Indian Affairs because of the hostile condition of the Government's relation with certain Indians in that country, which, however, was not caused by plaintiff Indians. Due to the intrusion and conduct of certain white settlers, and the resentment thereof by certain Indians, there were open hostilities with the Rogue River Indians, a great many of whom were exterminated. A great many of the other Rouge River bands of Indians were driven from their homes into the mountains, but after hostilities ceased they were rounded up and permanently placed upon the Coast Reservation, hereinafter mentioned, created in part out of the land claimed by plaintiff Tillamooks tribe. A great many of these Rogue River Indians died of disease contracted from exposure during this period. When various other treaties which had been negotiated, made, and executed by Anson Dart, Gen. Palmer, and others with various tribes and bands of Indians were finally sent by the Commissioner of Indian Affairs to the Secretary of the Interior, and, by him, to the President, who transmitted them to the Senate for ratification, the treaty of August 11, 1855 with certain plaintiff tribes and bands was accidentally and unintentionally overlooked and not sent along with the other treaties. Some of the treaties transmitted at that time for ratification appear to have been those made in 1853, 1854, and 1855, mentioned in clause (a) of the jurisdictional act, certain of which tied in with the Coast Reservation defined and sought to be created by art. 1 of the unratified treaty with certain plaintiff bands and tribes of August 11, 1855, and as described in the Executive Order of November 9, 1855, hereinafter referred to.

The 1855 treaty and the original papers, including the instructions to and the reports from Gen. Palmer as appear from the Journal of the Senate, were sent to the Senate by the President February 11, 1857; on February 18 the treaty was read and referred to the Committee on Indian Affairs. The treaty was not reported out by the committee and Congress adjourned shortly after the treaty was submitted; it was never acted upon by the Senate, as shown by Senate Executive Document No. 25, 53rd Cong., 1st sess., referred to in clause (b) of the jurisdictional act herein.

At the next session of Congress this treaty of August 11, 1855, and certain other treaties which had been negotiated and made in 1851, were not reported by the Indian Affairs' Committee to the Senate for consideration, apparently for the reasons hereinbefore mentioned, and these treaties were never thereafter acted upon by the Senate.

5. Prior to execution of the treaty of 1855, and after Joel Palmer became superintendent of Indian Affairs in Oregon, he was duly authorized and directed by the President to draft and negotiate treaties for the purpose of extinguishing the Indian title to lands in Oregon Territory, including the lands described in the unratified treaty of 1855, with certain of plaintiff tribes and bands. Palmer was notified of his appointment by the Commissioner of Indian Affairs August 12, 1854, and in the performance of such duties and functions, and by direction of the President, through the Bureau of Indian Affairs, it became and was his duty to investigate and ascertain the location of the several Indian tribes and bands who occupied and held possession of lands, the areas thereof and the nature and extent of such occupancy and use, and to secure the signatures of the tribes and bands of Indians who owned and occupied, the lands and held the original Indian title sought to be extinguished. This he did with care and thoroughness.

In the notice of his appointment, transmitted by the Commissioner of Indian Affairs, Gen. Palmer was advised that "You will furnish me with a skeleton map of Oregon Territory showing the location of the different tribes, with the extent of territory claimed by each and the nature or tenure of the claim and as treaties are made designate the reserve provided for Indian use with such precision that it may be laid down on the map here."

46 In further carrying out his instructions and duties Palmer made an extended trip, or trips, over the land described in the treaty of August 11, 1855, assisted by Oris Taylor and J. L. Parrish, Indian Agent, Port Orford District, and thus obtained the added store of information required by the Bureau of Indian Affairs. The Port Orford District, of which J. L. Parrish was the duly appointed Indian agent, was located on the coast of southern Oregon in the area of the lands occupied and held by the Indians of the

Coquille, the Too-too-to-ney, and the Chetco tribes. Gen. Palmer accumulated and submitted detailed data of the geographical location and names of the tribes and bands; and submitted definite boundaries of the lands of plaintiff tribes and bands of the Tillamooks, Too-too-to-neys, Coquilles and Chetcos who were parties to the treaty of August 11, 1855, in the form of a written report to the Commissioner of Indian Affairs, accompanied with a detailed report from J. L. Parrish, Indian agent, in which was set out the location of the various tribes and bands of Indians.

The Too-too-to-ney, the Chetco, and the Coquille tribes are described in the Palmer report as occupying "That part of Oregon south of the waters of Coos Bay and west of the Summit of the Coast Range of Mountains."

The Palmer report further stated:

> A detailed statement of Indian affairs in the Port Orford district will be found in the accompanying report of Agent Parrish. He enumerates twelve distinct bands, with an aggregate population of 1,311 souls, and includes them all in the Too-ton-ton [Too-too-to-ney] tribe. These bands, however, speak at least four distinct languages, and but few in each band can converse with those of another. Those grouped as one band often reside in several villages. These bands are scattered over a great extent of country—along the coast and along the streams from the California line to 20 miles north of the Coquille [region], and from the ocean to the summit of the Coast Range of mountains. I visited several bands in person, and directed Mr. Taylor to accompany and assist the agent [Parrish] in ascertaining the numbers of the remainder. Excepting the Chetcas [Chetcos] and Coquilles, I found these Indians at peace with the whites and among themselves. They are
> 47 willing the whites should occupy their lands, provided they are permitted to retain their fisheries, from which they mainly derive their subsistence.

The territory of plaintiff bands of Tillamooks is set out in the Palmer report as "The country along the coast from Umpqua river to the Ne-a-ches-na [river], a distance of about 120 miles, is occupied by five bands of the Tillamook[s] tribe."

6. Plaintiffs, the Tillamook, Coquille, Too-too-to-neys, and Chetco tribes and bands, parties to the unratified treaty of August 11, 1855, had exclusively occupied, held, and used

from time immemorial (as shown by the proof from as early as 1750) that part of the lands embraced and described in the unratified treaty of 1855, as hereinafter particularly described, lying south of the north line of the Coast Reservation, mentioned as a reserve for the Indians in the unratified treaty of August 11, 1855, and described in a subsequent Executive order of November 9, 1855. The plaintiff tribes and bands above-mentioned in this finding had immemorially, and long prior to the date of the unratified treaty of August 11, 1855, held original Indian title, claim and rights to, in, and upon the lands and appurtenances thereon within the boundaries as are hereinafter in findings 8, 9, and 10 specifically described and set forth.

7. The four bands of plaintiff Tillamooks tribe which lived south of Cape Lookout and the north line of the reservation described in the treaty were designated in the treaty as bands of Tillamooks, and signed such treaty without further designation. However, the four bands constituted a tribe all speaking the same language. They were sometimes called the Yacons or Southern Tillamooks, and they held and occupied the contiguous lands, as hereinafter described in finding 8.

The Coquille tribe of Indians was composed of bands as set out in the caption of the petition herein and in the treaty of 1855. These bands of Coquille Indians were designated as a tribe by the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Too-too-to-ney tribe of Indians was composed
48 of the bands as set out in the caption hereof, and were so designated in the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Chetco tribe was at all times considered as a part of the Too-too-to-ney tribe, but there was a slight difference in the language of the two tribes. They were designated in the report of Gen. Palmer as the Too-too-to-neys, referred to in the treaty as the "Chetco tribe," and, although signing the treaty in the column with the Too-too-to-ney bands, signed the treaty as "Chetco Tribe." This tribe occupied the tract of land which was contiguous to the lands of the Too-too-to-ney tribe, as hereinafter described and set forth.

8. The bands of plaintiff Tillamooks tribe, the bands of the Coquille tribe, and the bands of the Too-too-to-ney tribe, including the Chetco tribe, are sometimes, for convenience, referred to hereinafter as the Tillamooks, Coquilles, Too-too-to-neys, and the Chetcos, respectively. The land so exclusively occupied, held, and used by plaintiff bands of Tillamooks, and to which they held and owned the original title, claim and right, is described as follows:

Commencing at the mouth of the north ten mile creek about midway between the Alcea and Sieuslaw River, running thence east to the summit of the Coast Range of Mountains, thence north along said summit to a point due east from Cape Lookout, thence west to the Pacific Ocean at said Cape Lookout, thence in a southerly direction along said Pacific Coast line to the point of beginning.

The four different bands of Tillamooks occupied the land above described in this finding commencing from the south in the following order: the Alceas, the Yahquonahs, the Seletcas, and the Neachesnas (Nestuccas and Salmon River Indians). The northern boundary of the land so occupied by the Alcea Band of Tillamooks commences on the coast just north of Bay View and runs thence northeasterly along the watershed between the Alcea and Yaquina River to the summit of the Coast Range of mountains. The northern line of the territory occupied by the Yahquonahs commences at the coast just south of Cape Foulweather thence in an easterly direction along the line of the watershed between the Siletz and the Yaquina River to the Coast
49 Range of mountains. The northern boundary of the territory occupied by the Seletca Band of Tillamooks commences on the coast at a point five miles north of where the town of Taft now stands running thence in an easterly direction along the northerly watershed of the Siletz River to the summit of the Coast Range of mountains. The northern boundary of the territory occupied by the Neachesna Band of Tillamooks was the northerly line of the Coast Reservation as hereinafter set out.

9. The lands so exclusively occupied, held and used by the Too-too-to-neys, including the Chetco tribe, are described as follows: Starting at Four Mile Creek situated four miles south of the mouth of the Coquille River on the Pacific coast running east four miles, thence following along the

watershed between the south fork of the Coquille River and the headwaters of Flores River and Sixes River in a southeasterly direction to Illahe (town), situated in the Rogue River drainage, thence in a northeasterly direction along the divide between the headwaters of the south fork and middle fork of the Coquille River and the headwaters of tributaries of the Rogue River and of Cow Creek tributary of the Umpqua River to Camas Valley located at a point near the easterly boundary of the land described in the unratified treaty; thence in a southerly direction following the easterly line of said land described in the unratified treaty to the California state line; thence west to the Pacific Coast line; thence in a northerly direction along said coast line to the point of beginning.

The land in this finding above described as the territory occupied by the Chetco Tribe starts at the coast of Cape Sebastian and runs thence in an easterly direction in a meandering line following the watershed which separates Hunters Creek and Pistol River, thence around the headwaters of Chetco River in a southeasterly direction where it intersects the boundary line with California at a point about 123°50′ west longitude. These boundary lines other than the northerly line of the plaintiff Tillamooks' territory are and were as shown on the map showing tribal distribution accompanying the report of John P. Harrington, being plaintiffs' exhibit 2, which map so far as it furnishes the lines described in these findings is made a part hereof by reference.

10. The land so exclusively occupied, held and used by the Coquilles is described as follows: All that land lying between the easterly and westerly boundary of the land described in the unratified treaty lying between the northerly line of the land hereinbefore described as belonging to said Too-too-to-neys and a line commencing at Cut Creek or Whiskey Run about three miles north of the mouth of the Coquille River, thence in a northeasterly direction following the divide between South Slough, Island Slough, and Sumner Slough, on the north, and the drainage of the lower Coquille River on the south, thence along the divide between the south fork of Coos River on the north and the Drainage of upper Coquille River on the south in a southeasterly direc-

tion to the east line of the land described in the unratified treaty, at Camas Valley.

11. The Indian tribes and bands above-mentioned occupied more or less accurately described areas of land with clearly defined boundaries, and lived principally along rivers and creek banks bearing the same name as the tribe living along its banks. Generally, they appear to have taken their tribal designations from, or to have been given the names of certain streams along which they lived, or the streams were named for the Indian tribes.

The above-described lands which were ceded, including a portion of the total area which was designated by the unratified treaty of August 11, 1855, as a residence for Indians, were in the exclusive possession and use of plaintiffs Tillamooks, Too-too-to-ney, Coquille, and the Chetco bands and tribes, parties to this unratified treaty.

12. Plaintiffs Tillamooks, Too-too-to-ney, Chetco, and Coquille bands and tribes gave up their original Indian title to their lands in accordance with the conditional promises made by them in the unratified treaty of 1855 and went upon or were removed by the Government to the area mentioned in the treaty as a residence, described as a conditional reservation by the Executive Order of November 9, 1855, and later known as the Coast Reservation. This reservation, as described in the unratified treaty, and which was
51 approximately that described in the Executive Order of November 9, was composed in part of a portion of the lands exclusively used, held, and occupied under original Indian title by the plaintiff bands of Indians composing the Tillamooks tribe. A part of the reservation at its south end appears to have included some of the lands claimed by the Coos Bay, Umpqua, or Siuslaw tribes.

This reservation was later reduced or diminished, as hereinafter mentioned, by an Executive Order of December 21, 1865, and, further, by acts of Congress of March 3, 1875, 18 Stat. 420, 446, and May 13, 1910, 36 Stat. 367.

The Tillamook, Too-too-to-ney, Chetco, and Coquille bands and tribes, plaintiffs herein, have never received any compensation for the lands to which they had original Indian title, hereinbefore mentioned in findings 8, 9, and 10, or the lands taken from the reservation and restored to the

public domain by reduction of the Coast or Siletz Reservation by Executive Order of 1865 and the act of Congress of 1875, except to the extent that the Indians of the Tillamook, Too-too-to-ney, Coquille, and Chetco tribes benefited with respect to land to which the Tillamooks had original Indian title under the allotment act of February 8, 1887 (24 Stat. 388), the agreement of October 31, 1892 (28 Stat. 286, 323), the act of May 31, 1900 (31 Stat. 221, 223), and the act of May 18, 1916 (39 Stat. 123, 149).

Protests of the failure of the United States to ratify the treaty of August 11, 1855, were continuously made by the Indian tribes and bands, parties thereto, by the Government's Indian superintendents and agents and the Commissioner of Indian Affairs in his annual reports, in practically all reports up to and including 1869, and such protests continued thereafter at various times until the jurisdictional act herein was enacted.

13. The reservation herein known as the Coast or Siletz Reservation as originally described in the 1855 treaty and, for the most part, within the boundaries of the land to which plaintiff Tillamooks tribe and bands had original Indian title, was conditionally recommended and created during the period April 17 to November 9, 1855, under the circumstances and for the purposes shown below.

52 On April 17, before the unratified treaty dated August 11, 1855, was negotiated, Indian Superintendent Joel Palmer wrote the Commissioner of Indian Affairs as follows:

> Believing that the welfare of the Indians on the coast and in the Umpqua and Willamette valleys would be promoted and the policy of the Government more effectively carried out by designating without delay an Indian reserve on the coast, I have caused the inclosed notice to be published in the several newspapers of this Territory.
>
> I have been impelled to this step by learning that many persons contemplate soon to commence settlements in several small valleys of the designated district, and from the reluctance of the coast Indians to remove to the interior, a measure which I believe would be disastrous to them as a people, and attended with enormous expense to the Government.
>
> Being satisfied that no other section, offering so few attractions to the whites, combine more facilities for the

comfort and subsistence of the Indians, I have selected this tract and recommend that it be made a permanent Indian reserve.

Should the Indians of the Willamette and Umpqua valleys be removed east of the Cascade Mountains this reserve may be curtailed, but should they be located thereon the entire tract will be required.

This portion of the Territory has not yet been purchased, but this will probably be effected during this summer, and the entire Indian population of the coast confederated.

I had contemplated visiting the coast bands this spring but owing to the nonreception of funds, and the state of affairs in middle Oregon, I have deemed it best to postpone my trip to the coast until my return from the interior.

I will, if possible, effect a treaty of purchase with those Indians during the summer.

April 18, Superintendent Palmer again wrote the Commissioner of Indian Affairs as follows:

I send by to-day's mail a tin case containing a map of Oregon Territory, which I have had executed. This map, of course, is not presumed to be accurate in all respects, but it approximates as near to correctness as the means in our possession would permit.

The portions within the limits of the actual surveys may be regarded as accurate. Mr. Belden, the pro-
53 jector, having access to all the plats of survey in the office of the Surveyor-General. Other portions are in accordance with the most reliable information, but actual surveys may prove many inaccuracies.

I have delineated on the map the boundary of the proposed reserve on the coast, north of the Umpqua River, designed for the Indians of the entire seaboard of Oregon, those of this valley, and perhaps of Umpqua Valley.

June 29, the Commissioner of Indian Affairs wrote Palmer as follows:

I received on the 25th ultimo your letters of the 17th and 18th of April last, the first enclosing a copy of a notice designed to prevent settlement by whites on lands which you have thought proper to select as an Indian reservation on the coast of Oregon, and the latter stating that you had forwarded by the same mail a tin case containing a map of Oregon, with the reservation alluded to designated thereon.

The office would have given earlier attention to this subject but for the fact that it has waited the arrival

of each successive mail since the letters came to hand in the hope of receiving the map referred to, but as it has not yet arrived the presumption is that it has been mislaid or lost.

As your report is not of a character to give full information as to the locality of the reserve in the absence of the map, I have deemed it best, in view of the importance of the subject and to secure an early arrangement of the matter if found practicable, thus early to advise you of the nonarrival of said map that you may send me a duplicate of the same.

The precaution taken by you in giving public notice of the selection of the reserve to prohibit settlement by whites thereon is approved.

It is desirable that you furnish some further data concerning the land selected, as well as to the character of the country and soil and its extent, if it is in your power to do so.

As soon as you shall do so, and the map arrives here, some conclusion upon the proposition will be arrived at and communicated to you. But on the receipt of this you will inform the land officers of the district, within which the proposed reservation lies, of its boundaries, that they may be able to recognize the plat, and in their official capacity respect the same, as the Commissioner of the General Land Office has been requested to instruct them to do.

54 On the same date the Commissioner of Indian Affairs wrote the Commissioner of the General Land Office as follows:

The superintendent of Indian affairs of Oregon, under dates of 17th and 18th of April last, advised this office of the selection on the coast of Oregon of a district of country for an Indian reservation. In that of the 17th of April was inclosed a copy of a public notice stated to have been published in the several newspapers in the Territory, giving information that said "reservation will not be subject to settlement by whites." That of the 18th informed this office that a map inclosed in a tin case was forwarded by the same mail, the outlines of the country designated as the reserve being marked on this map.

I have waited until this time without calling attention to the subject in the hope that the map would arrive by some of the recent mails, but it has not yet come to hand; so with a view, as far as practicable, to secure respect to the notice given by the superintendent, I inclose to you herewith a transcript of the copy received here, and request that so far as the same is within the

power of the officers of your department, that they be instructed officially to respect the same in view of this request.

Supt. Palmer has this day been directed to inform the proper land officers of the district where the land lies, what are its boundaries. As soon as a duplicate of the map, which has been sent for, shall arrive, with such data as will enable this Department to fix by definite metes and bounds the country designated, should it be deemed proper to withhold the same for the exclusive occupancy of the Indians of that section of the country, your office will be advised. In the meantime it is desirable that no settlements by whites be authorized to be made thereon by or under the authority of the Government.

July 31, the Commissioner of Indian Affairs wrote Superintendent Palmer as follows:

Referring to my letter to you of the 29th ultimo, stating that a map of an Indian reserve on the coast of Oregon, previously represented by you to have been sent to this office, had not been received, and requesting duplicate to be sent here, I have now to inform you that said map was received by the last mail from the Pacific and it will therefore not be necessary to send the duplicate referred to.

The subject referred to in your communication transmitting this map will be considered and the conclusions of the Department thereon will be duly communicated to you at an early day.

September 3, the Commissioner of the General Land Office wrote the Commissioner of Indian Affairs as follows:

Your communication of the 29th of June last, and its inclosure relative to a proposed reservation for Indians on the Pacific coast, Oregon Territory, and promising a map of the same, which had not yet reached your office, has been necessarily held up for want of said map and in consequence of not being able from the description to identify the southern boundary of the reserve on any of the maps in this office. I will thank you to transmit the map, if it has since been received, in order that the action of this office may be consummated by procuring the order of the President for the reservation and issuing the necessary instructions.

September 6 the Commissioner of Indian Affairs replied to the above letter as follows:

Agreeably to the request contained in your letter of the 3d instant, I transmit herewith the map showing the

locality of certain Indians in Oregon and the proposed reservation upon the Pacific coast, referred to in my letter to your office of 28th June last.

This map was received here several days since and it was in contemplation to furnish your office with a copy, but owing to the illness of the gentleman who executes the drafting for this office it has been delayed. I have, therefore, to suggest that a copy be made as early as convenient for the use of your office and that the original be returned here.

September 10, the Commissioner of the General Land Office sent the following letter to the Secretary of the Interior recommending the conditional creation of a proposed reservation for Indian purposes, as had been recommended by Gen. Palmer and as subsequently substantially set forth by him in the proposed treaty dated August 11, 1855:

I have the honor to submit herewith two letters from the Acting Commissioner of Indian Affairs of the 29th June last and the 6th instant, recommending a
56 large reservation of land, for the Coast, Umpqua, and Willamette Tribes of Indians in Or Territory, as shown by the *blue* shaded lines and the enclosed diagram, marked A, taken from the general map received with the Acting Commissioner's letter of the 6th instant and embracing, as will be seen, about 100 miles of the Pacific coast from "Cape Look Out" to a point midway between the Umpqua and Siuslaw (Sciiticom) rivers, by an average depth of 20 miles.

Previous to issuing the instructions requested by the Acting Commissioner, I respectfully recommend that the order of the President be first obtained for the proposed reservation.

Prior to the writing of this letter of September 10, 1855, treaties had been negotiated and signed in 1853, 1854, and 1855, and duly ratified by the Senate with the bands of Indians of the Rogue River tribe, the Chastas, the Scotons (which were Coast Indians), the Confederated Bands of the Umpqua tribe and the Confederated Bands of Indians in the Willamette Valley known as the Willamette tribes (see finding 3). The ratified treaties with these tribes provided that they would be given permanent homes, care, and protection, and various other things were promised to the tribes on a permanent reservation for their permanent homes; one of these treaties mentioned such permanent

home as the Coast Reservation described in the unratified treaty of August 11, 1855, with certain of plaintiff tribes.

Upon receipt of the above-quoted letter of September 10, the Secretary of the Interior wrote the Commissioner of Indian Affairs for a full report on the matter, and as to the authority for the proposed reservation. October 29, the Commissioner of Indian Affairs replied and, so far as here material, stated as follows:

> I have the honor to acknowledge the receipt here, by reference from your Department, of the letter of the Commissioner of the General Land Office of the 10th ultimo, inclosing letters from this to that office of the 29th June last and 6th ultimo, respectively, with a map showing the tract of country that has been reported here as suitable for the location of the Indians on the Pacific coast for "a report as to the authority for the reservation in question."
>
> 57 Under the act of 5th June, 1850, specific authority was given by law for the holding of treaties in Oregon, looking then to the purchase of the Indian title to the lands west and the removal of the Indians toward the interior, east of the Cascade Mountains. An appropriation of $68,000 was also made in the Indian appropriation act of July 31, 1854, "for the expenses of negotiating treaties with and making presents of goods and provisions to, the Indian tribes in the Territory of Oregon."
>
> By the same act, an item of $5,000 was appropriated to pay for the treaties made in 1853 with the Rogue River and Cow Creek band of Umpqua Indians. * * *.
>
> As Congress is not now in session nor as yet are the reports of the Superintendent of Indian Affairs in Oregon so full as is desired to enable the office to make a final report upon the proposition, it was deemed proper that for the time being, and, until the subject could be more fully considered, the tract of country selected by the superintendent should be withheld from settlement. It is believed that this course does not conflict with the uniform policy of the Government, and is in keeping with that pursued in the case of the treaties in Oregon already ratified.
>
> * * * * *
>
> On the 29th of June, upwards of a month after the reception of the letter from the superintendent recommending the reservation, and near a month anterior to the receipt of the map, in view of frequent casualties causing delay in the transmission of mail matter, and presuming Supt. Palmer would feel some concern as to

the result of his recommendation, the Acting Commissioner of this Office advised him of the receipt of his letter and the nonarrival of the map and asked a duplicate of the latter. As will be seen by the copy of that letter, herewith, the preliminary steps taken by the superintendent were approved, but the definitive action to be taken under the direction of the Department of the Interior and the President of the United States, was necessarily postponed, because his report, in the absence of the map, was not of a character to give such full information as to enable this office properly to present the case for your consideration and that of the President. It was, therefore, deemed best to ask "Further data concerning the land selected, as well as to the character of the country and soil, as to its extent," etc. On the receipt of which he was informed that
58 "Some conclusion upon the proposition would be arrived at and communicated to him."

From a letter from Supt. Palmer of the 24th of July last, received here on the 11th ultimo, an extract from which is also herewith, it appears that very great embarrassment must result to the service because this subject has not been determined. As, therefore, the policy of concentrating the Indians upon one or more reservations is that already adopted in the State of California by act of Congress, and I know no reason why the recommendation made by the superintendent is not the best. In view of all the surrounding circumstances, that can be devised, I respectfully recommend that the tract of land designated on the accompanying map from the General Land Office as that "proposed for Coast and Umpqua and Willamette Indians," be reserved from sale or settlement and set apart for Indian purposes, subject, however, to such curtailment in dimensions as treaties hereafter to be made and ratified and a better knowledge of the requirements of the Indians may admit, under the direction of Congress. It is only by some such action that the salutary provisions for treating with the Indians of Oregon for a cession of their lands to the United States, and their consequent concentration at any point can be carried into effect without the delay of further legislation, if not war and bloodshed.

* * * * *

After receipt and consideration of the above quoted letter of October 29, the Secretary of the Interior on November 8, 1855, wrote a letter to the President submitting this proposed

conditional reservation to him for approval. This letter of the Secretary was as follows:

> I herewith submit for your approval a proposed reservation for Indians on the coast of Oregon Territory recommended by the Commissioner of Indian Affairs and submitted to the Department by the Commissioner of the General Land Office for the procurement of your order on subject, in letter of the 10th September last.
>
> Before submitting the matter to you I desired to have a full report of the subject from the Indian Office; and the letter of the head of that Bureau, of the 29th ultimo, having been received and considered, I see no objection to the conditional reservation asked for "subject to future curtailment, if found proper," or entire relief thereof, should Congress not sanction the object rendering
> 59 this withdrawal of the land from white settlement at this time advisable. A plat marked A, and indicating the boundaries of the reservation, accompanies the papers, and has prepared thereon the necessary order for your signature should you think fit to sanction the reservation.

Thereupon the President issued an Executive Order of November 9, 1855, as follows:

> The reservation of the land within the blue shaded lines is hereby made for the purposes indicated in the letter of the Commissioner of the General Land Office of the 10th September last and letter of the Secretary of the Interior of the 8th November 1855.
>
> (Sgd.) FRANKLIN PIERCE.

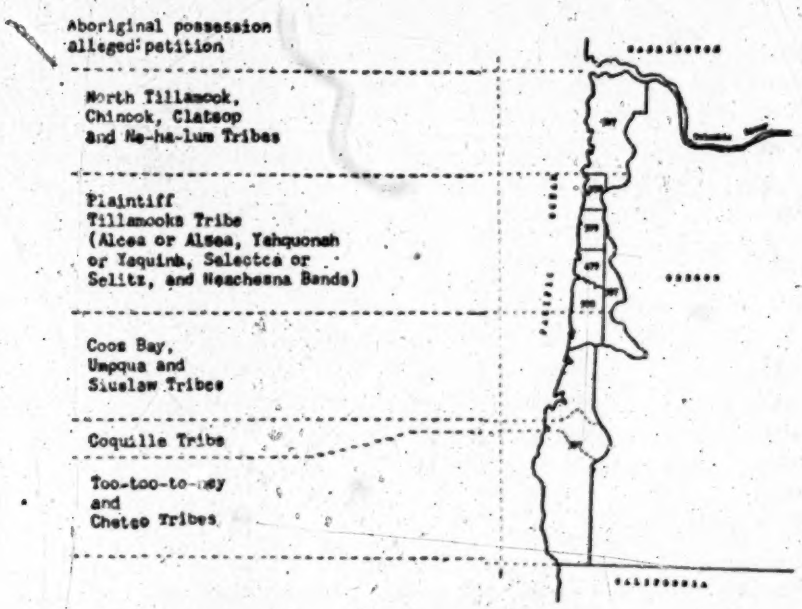
14. The particular description of the said reservation within the "blue shaded lines" referred to in the Executive Order of November 9 is as follows:

> Beginning on the shore of the Pacific ocean at the mouth of a small stream (Tsiltcoos river), about midway between Umpqua and Siuslaw rivers; thence easterly to the ridge dividing the waters of these streams, and along said ridge or highland to the western boundary of the eighth range of township W. of the Willamette meridian; thence N. on said boundary to a point due E. of Cape Lookout; thence W. to the ocean; and thence along the coast to the place of beginning.

15. The map which accompanied the letter of the Secretary of Interior and the Executive Order of November 9, 1855, showed the reservation to be, as indicated by the General Land

Office, for the "Coast, Umpqua and Willamette tribes." This Coast Reservation, later known also as the Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west, containing about 1,100,000 acres between the summit of the Coast Range of mountains and the Oregon coast, lying immediately south of Cape Lookout and marked on plate 51 of a map in Royce's Indian Land Cessions of the United States (18th Annual Report of the Bureau of American Ethnology) as parcels 578, 579, 479, and 578 (repeated for a lower tract), which descriptions are shown on the sketch reproduced here, which sketch also shows within the dotted lines the approximate areas within which the tribes mentioned therein lived.

60



16. The boundaries particularly set forth in finding 14, which were those designated in the Executive Order of November 9, were approximately those of the reservation set out in the unratified treaty of August 11, 1855. Congress acquiesced in and ratified the Executive Order of November 9, 1855, as only conditionally withdrawing the land from public settlement by the passage of the act of March 3, 1875 (18 Stat. 420, 446), hereinafter referred to.

17. The land to which plaintiff Tillamooks tribe owned and held original Indian title as hereinbefore described, and as approximately indicated on the above sketch, lay for the most part within the confines of the original Coast Reservation, and such land of this tribe as was within such reservation was taken on November 9, 1855, in part by defendant from the Tillamook tribe for the benefit of other tribes and bands and in part for the benefit of the United States as and when it might desire to use it for public purposes, by virtue of the Executive Order of November 9, 1855, ratified by Congress. The land of the Tillamook tribe, as hereinbefore described in finding 8, as lay outside the boundaries of said Coast Reservation was taken by defend-
61 ant from said Tillamooks on November 9, 1855, or soon thereafter, as were the lands of the Coquille, Too-too-to-ney, and the Chetco tribes when these four tribes were moved off their lands in 1855, at or about the date of the Executive Order of November 9 creating the Coast Reservation described therein.

18. The land of plaintiff Tillamooks tribe outside the Coast Reservation and all the lands of the Coquille, Too-too-to-ney, and Chetco tribes were taken by inducing and coercing the Indians of these tribes to move from their lands, to which they held original Indian use and occupancy title, to the Coast Reservation upon the promise that the treaty of August 11, 1855, would be ratified and the terms thereof carried out by the United States—which was not done.

The lands formerly held and occupied by plaintiffs Tillamooks, Coquille, Too-too-to-ney, and the Chetco tribes, exclusive of the portion of land of the Tillamooks included in the Coast Reservation, were immediately opened to homestead entry and settlement as public lands of the United States, which action was known to, acquiesced in, and subsequently ratified by Congress; the lands originally within the reservation under the unratified treaty and the Executive Order of November 9, 1855, which were later excluded by the Executive Order of December 21, 1865, and the act of Congress of March 3, 1875, were disposed of as public lands immediately upon the taking effect of such Executive Order and statute.

19. After the treaty of August 11, 1855, had been signed by Gen. Palmer on behalf of the United States and by the

chiefs and headmen of the Indian tribes and bands, parties thereto, and without awaiting ratification thereof, the United States dispossessed the Indians of the Coquille, Too-too-to-ney, and Chetco tribes; and in part the Tillamooks, all parties to the treaty, of their lands, and without the consent of the Indian tribes mentioned and against their will, independently of the conditional consent expressed by them in unratified treaty of August 11, 1855, and without compensation then or later, and appropriated such lands for the use and benefit of the United States.

62 20. Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation.

21. On December 20, 1865, the Secretary of the Interior recommended to the President that an Executive Order be made releasing or withdrawing from the Coast Reservation theretofore "set apart conditionally" and restoring to public use that portion of such Coast Reservation, as follows:

> * * * Commencing at a point 2 miles south of the Siletz Agency; thence west to the Pacific Ocean; thence south along said ocean to the mouth of the Alsea River; thence up said river to the eastern boundary of the reservation; thence north along said eastern boundary to a point due east of the place of beginning; thence west to the place of beginning.

Thereupon an Executive Order was issued as follows:

> EXECUTIVE MANSION,
> *December 21, 1865.*
>
> The recommendation of the Secretary of the Interior is approved, and the tract of land within described will be released from reservation and thrown open to occupancy and use by the citizens as other public land.
>
> (Sgd.) ANDREW JOHNSON,
> *President.*

The land described in this Executive Order was withdrawn from the reservation without consent of the Indians

and without compensation as a result of insistent demands made by white settlers. The land so withdrawn consisted of a strip from the coast to the eastern boundary of the reservation which is designated as parcel #479 on the sketch hereinbefore reproduced in finding 15. This tract was about twenty-five miles north and south by twenty miles east and west. Plaintiff Tillamook tribe originally owned and exclusively held original Indian use and occu-
63 pancy title to the area so taken from the reservation, which was, by the Executive Order in 1865, immediately opened for public settlement.

This Executive Order separated the Coast Reservation into two parts and, thereafter, the north portion was known as the Siletz Reservation and the south portion as the Alcea Reservation. From time to time prior to the Executive Order in 1865 the Superintendent of Indian Affairs, of Oregon, had made various reports with reference to the proposed reduction of the Coast Reservation by withdrawing therefrom the strip of land in question for the benefit of white settlers, and in these reports he urged that, if this should be done, sufficient time should be given him to move the Indians off the area to be withdrawn from the reservation, and insisted that if it was done proper arrangements be first made with the Indians to compensate them therefor. Neither request of Superintendent Palmer was granted. The tract of land covered by the Executive Order was opened for public use and settlement before the Indian tribes and bands thereon were moved. The Indians were subsequently moved to other portions of the diminished reservation.

22. By an act of March 3, 1875 (18 Stat. 420, 446), Congress ratified the objects and purposes set forth in the above-quoted Executive Orders of November 9, 1855, and December 21, 1865, and the actions which had been taken thereunder, and, by that act, the remainder of the Coast Reservation was further modified or diminished as follows:

> And the Secretary of the Interior be, and hereby is, authorized to remove all bands of Indians now located upon the Alsea and Siletz Indian reservation, set apart for them by Executive order dated November ninth, eighteen hundred and fifty-five, and restored to the public domain by Executive order of December twenty-first, eighteen hundred and sixty-five, and to locate said

Indians upon the following described tract of country, namely: Beginning at a point two miles south of the Siletz agency; thence west to the Pacific Ocean; thence north, along said ocean, to the mouth of Salmon River; thence due east to the western boundary of the eighth range of township west of the Willamette meridian; thence south with said boundary to a point due east of the place of beginning; thence west to the place of beginning; which is hereby set apart as a permanent reservation for the Indians now occupying the same and to be hereafter located thereon; and all the balance of said Alsea and Siletz reservations is hereby thrown open to settlement under the land laws of the United States: *Provided*, That these Indians shall not be removed from their present reservation without their consent previously had.

64

The land described in the above-quoted statute as the diminished reservation was parcel 579 shown on the sketch reproduced in finding 15; the effect of the act was to withdraw from the reservation without the consent of the Indians and without compensation the two parcels shown on said sketch numbered 578 at the north and at the south ends of the reservation. Plaintiff Tillamooks bands origimally jointly held the original Indian title to north parcel 578 and all or a portion of south parcel 578. These tracts of land were, upon enactment of the act of March 3, 1875, immediately opened for public settlement and occupancy before the Indians thereon were removed to the diminished reservation. The withdrawal of the above-described lands in parcels numbered 578 from the Executive Order reservation was not conditioned upon the consent of the Indian tribes or bands thereon. The consent of the Indians to their removal from the two tracts numbered 578, upon which they were residing, to the diminished reservation was finally obtained about September 16, 1875, or thereafter, and they were removed by the Government to the diminished reservation about October 28, 1875. The names of the Indian tribes or bands so removed are not shown but they appear to have been the Alcea, the Coos Bay, the Umpqua, and the Siuslaw.

23. The general allotment act of February 8, 1887, 24 Stat. 388, provided for allotment of lands in severalty to Indians of various existing reservations if the President deemed such allotments advantageous for agricultural and

grazing purposes. In pursuance of this act certain allotments were made to Indians permanently located, at that time, on the diminished Siletz Reservation, as described in the act of March 3, 1875, *supra*.

65 On October 31, 1892, a certain agreement was negotiated and made pursuant to an act of July 13, 1892, 27 Stat. 120, 137, between commissioners on the part of the United States, and the chiefs, headmen, and other male adults of the Alcea and other Indians, not identified by the record, residing on the Siletz Reservation, which agreement is set out in full in sec. 15 of the act of August 15, 1894, 28 Stat. 286, 323. This act accepted, ratified, and confirmed the agreement which, in substance, ceded 178,840 acres of land within the diminished reservation as it then existed to the United States for $142,600, which was all the unallotted lands on the then existing reservation with the exception of five sections. This amount was, under the terms of the agreement, to be paid by the United States in the manner therein provided, namely: $100,000 to be deposited in the Treasury to the credit of various tribes and bands of Indians on the reservation at 5 percent interest, and the balance of $42,600 to be paid in cash to the various Indians concerned. May 16, 1895, by Presidential proclamation, the 178,840 acres of land so ceded were opened for public settlement pursuant to and in accordance with the act of Congress which ratified the agreement of October 31, 1892. The lands so ceded were embraced within and constituted a part of parcel 579 shown in the sketch reproduced in finding 15, with the exception of the five sections mentioned in the agreement.

24. By the act of May 31, 1900, 31 Stat. 221, 233, provision was made for payment of the balance of $100,000 mentioned in the preceding finding, which had been deposited at 5 percent interest to the credit of the Indians, directly to certain Indians on the diminished reservation mentioned who came within the requirements of that statute.

25. By the act of May 13, 1910, 36 Stat. 367, Congress gave the Government permission to dispose of the five sections of land reserved in the above-mentioned agreement of October 31, 1892. This act directed that the proceeds be used to reimburse the United States for expenses incurred in carrying out provisions of the act and for certain school

buildings, with their equipment and maintenance, and no part of the money was by that act to be paid directly to the Indians.

66 **26.** By the act of May 18, 1916, 39 Stat. 123, 149, Congress amended the act of May 13, 1910, so as to provide that the amount of money remaining after reimbursement of the United States for its expenses be paid share and share alike to the enrolled members of the Indian tribes on the Siletz Reservation.

27. The Siletz Confederated Tribes of Indians and the Willamette Valley Confederated Tribes of Indians, included as parties plaintiff in the petition, are composed of certain members of various bands or tribes not named in the record, and are sometimes so designated. The Confederated tribes of the Grand Ronde Community, Oregon (not otherwise identified), made plaintiffs in the petition herein, had organized by the Constitution under sec. 16 of the act of June 18, 1934, 48 Stat. 984, 987, and, as so organized, were authorized by such act to bring and prosecute authorized actions at law. The rights of these confederated tribes, such as they may be, are limited as representative of, for, and on behalf of the tribes, bands, and their descendants from which they were organized.

The Indians composing the above-mentioned three confederated tribes appear to be descendants of Indians who were members of certain tribes or bands not parties to the unratified treaty of August 11, 1855, or not otherwise entitled to sue under the jurisdictional act.

28. The predecessor tribes and bands of the Siletz Confederated Tribes of Indians were placed on the Coast Reservation.

The Willamette Confederated Tribes of Indians were not placed on the Coast Reservation.

The proof does not show that the Indians composing "The Confederated Tribes of the Grand Ronde Community, Oregon," were placed on the Coast Reservation, nor from what predecessor tribes or bands they were organized.

The last two above-mentioned Confederated tribes appear to have been Indians placed on the "Grand Ronde Reservation," which was not a part of the "Coast Reservation" but was a temporary reservation embraced in townships 5 and 6 south, of range 8 west, and parts of townships 5 and 6 south,

of range 7 west, Willamette District, Oregon, created
67 "for Indian purposes until otherwise ordered" by Executive Order of the President of June 30, 1857, for the colonization of Indian tribes in Oregon,—particularly for the Confederated Willamette Valley tribes, including the Calapoosia and Molel tribes, all parties to ratified treaties dated November 29, 1854, January 22, 1855, and December 21, 1855.

29. Plaintiffs Chinook, Clatsop, and the Ne-ha-lum tribes were placed on the Coast Reservation, but they were not parties to the unratified treaty of August 11, 1855 mentioned in clause (b) of the jurisdictional act (see finding 2). However they were parties to certain unratified treaties made in 1851 which attempted to cede certain lands lying north of the north boundary of the lands held and occupied by plaintiff Tillamooks tribe and north of the north boundary line of the Coast Reservation described in the treaty of August 11, 1855, and the Executive Order of November 9, 1855, which land, so mentioned in the treaty with them in 1851, was included in the description of the total area of land set out in the unratified treaty of August 11, 1855, as being ceded to the United States. These lands lay between the north line of said Coast Reservation, as originally defined, and the Columbia River. The dates of such 1851 unratified treaties made with these tribes by Anson Dart, and the description of the territory conditionally ceded therein were as follows:

The unratified treaty of August 5, 1851, with the Clatsop Tribe ceded by Article 1 all their land described therein as: Beginning at the western extremity of Point Adams, at the mouth of the Columbia River and running thence southerly, along the coast of the Pacific Ocean, to the mouth of a certain stream, south of what is called Tillamook Head, which stream is called by the Indians "Yock-les-reh-ta," thence easterly up and along said stream to its source; thence east to the summit of the Coast Range of Mountains; thence northerly to the Swalla-lockas, or Saddle Mountain; thence Northwesterly to the head waters of the Neetle or Lewis and Clark's River; thence down and along said river to Young's Bay; thence westerly along the shore of said bay, and the southern shore of the Columbia River to the place of beginning.

68 The unratified treaty of August 9, 1851, with the Kathlamet Band of Chinooks ceded by Article 1 all their lands described as: Beginning at point of land on Young's Bay called Ah-pin-pin running thence northerly and easterly following the southern shore of the Columbia River up to Hunt Mill; thence south on the west line of lands of the Konnaack band of Chinooks to the northern boundary of lands of the Klatakania Band of Chinooks; thence westerly following said northern boundary, and the northern boundary of lands formerly claimed by the Nuc-que-clah-we-muck Band of Indians. Also all the islands in the Columbia River opposite the above-described lands.

The unratified treaty of August 6, 1851, with the Nehalum Tribe (Naalem) ceded the territory lying between the southerly boundary line of the Clatsop tract above described and the northerly boundary line of the tract of land ceded in the unratified treaty of 1851 by the "Tillamook," or North Tillamook, Tribe, which is the northerly line of said Coast Reservation.

30. By the act of June ~~7~~, 1897 (30 Stat. 62), Congress made an appropriation for full settlement of claims under the unratified treaty of August 6, 1851 with the Naalem (which was the Ne-ha-lum tribe, a party plaintiff herein) band of the North Tillamook tribe, as follows:

> That there be paid to the Naalem band of the Tillamook tribe of Indians, of Oregon, the sum of ten thousand five hundred dollars, to be apportioned among those now living and the heirs of those who may be dead, by the Secretary of the Interior, as their respective rights may appear and that for this purpose there be appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of ten thousand five hundred dollars: *Provided*, That said Indians shall accept said sum in full of all demands or claims against the United States for the lands described in an agreement made with them dated the sixth day of August, eighteen hundred and fifty-one.

31. The act of Congress of August 24, 1912, (37 Stat. 518, 335), made the following provision for full settlement and satisfaction of claims arising out of certain unratified
69 treaties, mentioned in the act, negotiated and made in 1851 with the Tillamook, Clatsop, Chinook, and Nuc-quee-clah-we-muck tribes, as follows:

That there be paid to the Tillamook Tribe of Indians of Oregon the sum of ten thousand five hundred dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Clatsop Tribe of Indians of Oregon the sum of fifteen thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Nuc-quee-clah-we-muck Tribe of Indians of Oregon the sum of one thousand five hundred dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Kathlamet Band of Chinook Indians of Oregon the sum of seven thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Waukikum Band of Chinook Indians of Washington the sum of seven thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; that there be paid to the Wheelappa Band of Chinook Indians of Washington the sum of five thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear; and that there be paid to the Lower Band of Chinook Indians of Washington the sum of twenty thousand dollars, to be apportioned among those now living and the lineal descendants of those who may be dead, by the Secretary of the Interior, as their respective rights may appear, and for this purpose there be, and is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of sixty-six thousand dollars: *Provided*, That said Indians shall accept said sum, or their respective portions thereof, in full satisfaction of all demands or claims against the United States for the lands described in the agreements or unratified treaties between the United States and
70 said Indians dated, respectively, August seventh, eighteen hundred and fifty-one; August fifth, eighteen hundred and fifty-one; August seventh, eighteen hundred and fifty-one; August ninth, eighteen hundred and fifty-one; August eighth, eighteen hundred and fifty-one; August ninth, eighteen hundred and fifty-one; and August ninth, eighteen hundred and fifty-one: * * *."

32. The various tribes and bands mentioned in the foregoing acts of 1897 and 1912 (including the Clatsop, Chinook, and Ne-ha-lum tribes or bands, plaintiffs herein) accepted the sums appropriated to pay their claims in satisfaction and in full of all demands or claims against the United States for lands claimed by them and described in the agreements or unratified treaties in the year 1851 between such tribes and bands and the United States.

33. Plaintiff bands of Tillamooks did not belong to the "Tillamook Tribe" mentioned in the act of August 24, 1912, *supra*, nor to the "Naalem band of Tillamooks" mentioned in the act of June 7, 1897, *supra*. The territory of plaintiff bands of Tillamooks, known as Southern Tillamooks, lay south, while that of the Tillamook Tribe and the Naalem Band of Tillamooks, known as North Tillamooks, lay north of the north line of the Coast Reservation. None of plaintiff tribes or bands which was a party to the unratified treaty of August 11, 1855, described in the jurisdictional act, was a party to any of the above-mentioned 1851 treaties, or party beneficiary of the acts of Congress.

34. The particular lands for which claim for compensation is made in the petition herein, and as hereinbefore described and to which plaintiffs Tillamooks, Coquille, Too-too-toney, and the Chetco tribes held and owned the original Indian title through exclusive use and occupancy from time immemorial, were taken by the United States for a public purpose on or shortly after November 9, 1855, without payment of just compensation.

35. The various tribes and bands of Indians, including plaintiffs Tillamooks, Coquille, Too-too-to-ney, and Chetco, permanently placed by the Government on the Coast Reservation as described and defined by Executive Order of November 9, 1855, and as subsequently diminished, acquired occupancy rights, such as they were, in common
71 according to population or according to the specific area assigned to each tribe or band. The Coast Reservation as defined in Executive Order of November 9, 1855, was not originally created nor subsequently recognized by Congress, other than by the Act of August 12, 1894, and subsequent acts, as a reservation for the exclusive use and occupancy of plaintiff tribes and bands parties to the unratified

treaty of August 11, 1855, and other tribes and bands placed thereon.

36. Plaintiff bands of the Tillamooks tribe did not and have not at any time given binding consent to the placing by the United States of other tribes and bands of Indians on the land to which plaintiff bands of the Tillamooks tribe owned and held original Indian title in 1855 and for many years prior thereto.

Plaintiffs Tillamooks, Coquille, Too-too-to-ney, and Chetco tribes, parties to the unratified treaty of August 11, 1855, did not and have not given binding consent to the placing by the United States of other tribes or bands of Indians on the reservation included within the original or diminished boundaries of the Coast or Siletz Reservation.

37. Among the Indian tribes and bands, some of which appear to have been permanently placed upon and given permanent homes on the Coast Reservation, which did not have or claim original Indian use and occupancy title to any of the lands within such reservation, or to the lands for which claim is made in the petition herein under clause (*b*) of the jurisdictional act by the tribes and bands, parties to the unratified treaty of August 11, 1855, were the following:

(1) The Rogue River Tribe: Treaty of September 10, 1853, ratified April 12, 1854 (10 Stat. 1019)—art. 2 of which defined an area within the lands ceded as a reserve for their temporary use and occupancy "until a suitable selection shall be made by direction of the President for their permanent residence, and buildings erected thereon, and provision made for their removal."

(2) The Cow Creek Band of the Umpqua Tribe: Treaty of September 19, 1853, ratified April 12, 1854 (10 Stat. 1027)—art. 2 of which was the same as that above mentioned with reference to the Rogue River Tribe.

72 (3) The Chasta tribe, the Scotons tribe, and the Grave Creek band of Umpqua Tribe: Treaty of November 18, 1854, ratified March 3, 1855 (10 Stat. 1122)—art. 2 of which provided that these tribes would remove to "whatever reserve the President may at any time hereafter direct."

(4) The Confederated Bands of the Umpqua Tribe, and the Calapooeia bands residing in the Umpqua Valley: Treaty of November 29, 1854, ratified March 3, 1855 (10 Stat. 1125)—art. 1 of which defined an area within the cession

made by these Indians as a reservation, and stated that such "reserve shall be held by said Confederated bands, and such other bands as may be designated to reside thereupon, as an Indian reservation." This article further provided that the bands, parties to the treaty, might be moved elsewhere with their consent, and, if so moved, the reservation mentioned was to be sold by the United States for their benefit.

(5) The Confederated Bands of Indians residing in the Willamette Valley (15 bands listed), most of whom belonged to the Calapoosia Tribe: Treaty of January 22, 1855, ratified March 3, 1855 (10 Stat. 1143)—art. 1 of which provided that these bands were to remain in the area ceded by them in their treaty and on such temporary reserves thereon as should be made by the Indian superintendent "until a suitable district of country shall be designated for their permanent home and proper improvements made thereon; * * * At which time, or when thereafter directed by the superintendent or agent, said confederated bands engage peaceably to vacate the country hereby ceded and remove to the district which shall be designated for their permanent occupancy."

(6) The Mo-lal-la-las, or Molel, Tribe: Trea[illegible] of December 21, 1855, ratified March 8, 1859 (12 Stat. 98[illegible]). The Indians of this tribe by art. 1 of the treaty became confederated with the Indians of the Umpqua Tribe and the Calapoosia Tribe, or bands. Art. 3 of this treaty provided, as to the Molel, the Umpqua, and the Calapoosia tribes, that "* * * it is hereby agreed, the Umpaquahs and Calapoosias agreeing, that the bands thus confederated shall immediately remove to a tract of land selected on the headwaters of the Yamhill River adjoining the coast reservation; thereon to remain until the proper improvements are made upon
73 that [Coast] reservation, for the accommodation of said confederated bands, in accordance with the provisions of * * * the treaty of 29th November 1854, and when so made, to remove to said coast reservation, or such other point as may, by direction of the President * * *, be designated for the permanent residence of said Indians." Art. 6 stated that the temporary reserve or encampment adjoining the Coast Reservation was in the "Grand Round Valley." This temporary reservation was created by Executive Order of June 30, 1857 (finding 28) and was known as

the Grand Ronde Reservation. The United States agreed in this treaty to pay all costs of removal for transportation, subsistence, and medical care, in addition to all other promises and the payments provided for; and $12,000 was provided for in art. 6 to be used in extinguishing claims of settlers in the area of the temporary encampment, or reservation, in the Grand Ronde Valley.

The Indians of the Rogue River and Chasta tribes were placed on the Coast Reservation in May 1857.

Conclusion of law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs, the tribes and bands of the Tillamooks, the Coquille, the Too-too-to-ney, and the Chetco, are entitled to recover. Judgment as to the amount of recovery and the amount of offsets, if any, is reserved for further proceedings under rule 39 (a).

The court further concludes as a matter of law that plaintiffs Umpqua Tribe, Chinook Tribe, Clatsop Tribe, Ne-halum Tribe, Confederated Tribes of the Grand Ronde Community, Oregon, Willamette Valley Confederated Tribe, and the Siletz Confederated Tribe are not entitled to recover, and the petition is dismissed as to these tribes.

Opinion

LITTLETON, *Judge*, delivered the opinion of the court:

Section 1 of the jurisdictional act, 49 Stat. 801, under which this suit was brought provides as follows:

74 That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143), and December 21, 1855 (12 Stat. 981), may have against the United States; and

(b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grand Ronde, and the Siletz Reservations in said Territory.

Sec. 2 provides "That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * * and any nation, tribe, or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court." This section further provides that "The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law." It further provides that any and
75 all claims against the United States should be forever barred "unless suit be instituted or petition filed as herein provided" within five years from date of approval of the act.

Plaintiffs brought suit under clause (b) of the act upon claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon lands occupied by Indian tribes and bands described in the unratified treaty dated August 11, 1855, published in Senate Executive Document No. 25, Fifty-third Congress, first session, p. 815. This unratified treaty is set out in full in paragraph 8 of the petition (see finding 3).

The first question to be disposed of is whether certain tribes and bands made parties plaintiff in the petition

herein are entitled under the jurisdictional act and the allegations of the petition to bring and maintain this suit for compensation.

The second amended petition sets forth, in paragraphs 5, 6, and 7, specific claims based on original Indian title for lands alleged to have been taken only by and on behalf of plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos. The petition does not set forth facts sufficient to show the nature or extent of any legal or equitable claim, or claims, if any, which any of the tribes made plaintiffs in the petition, other than the four tribes above mentioned, may have against the United States.

Paragraph 13 of the amended petition seems to be a blanket claim without any allegation of facts to show the nature, extent, or basis thereof, on behalf of all tribes and bands of Indians made plaintiffs herein, including the Tillamooks, Coquilles, Too-too-to-neys, and Chetcos, whether they did or did not have treaties ratified or unratified with the Government, or no treaties at all, some of which Indians appear to have been, at some time not alleged, placed by the Government on the Coast Reservation conditionally created by Executive Order of November 9, 1855, as set forth in finding 13.

Paragraph 11 of the petition states "That said plaintiffs were Coast tribes" and that when said reservation was set apart for "Coast, Umpqua and Willamette tribes they became entitled jointly with such other Indians therein
76 named to its lands for a reservation to the exclusion of Indians not therein named. That defendant violated their said rights in said reservation to their great damage by placing Rogue River, Chasta, and other Indians [upon these lands] not included in the terms of [the Executive Order creating] said reservation and by taking the lands as hereinafter described." The "other Indians" are not identified by the petition, or by proof.

Paragraph 12 of the petition states "That by Executive Order of December 21, 1865, the defendant took away from said Indians without authority of law to their great damage said tract No. 479. That by act of Congress March 3, 1875 (18 Stat. 420, 446 [446]), the defendant took away said two tracts each No. 578, leaving only tract No. 579." (See sketch reproduced in finding 15.)

Paragraph 13 of the petition alleges as follows:

> That all of said tribes including bands and tribes having entered into no treaty ratified or unratified claim damages because of violations of agreements, Acts of Congress and executive orders and because of Acts of Congress and executive orders and acts of dispossession relating to realty, personal property, rights of possession, rights to minerals, timber rights, fishing and hunting rights.

No other mention is made in the petition of any specific claim by any particular tribe or band that was a party to any of the ratified treaties mentioned in clause (a) of the jurisdictional act which is claimed to have arisen under or to have grown out of any of the ratified treaties, or which may have arisen under or grown out of any Executive Order or acts of Congress which may have violated any of such ratified treaties. The above-quoted allegations from pars. 11, 12, and 13 of the petition appear to be the sole basis for the claim, or claims, for "damages" made on behalf of the Umpqua, Chinook, Clatsop, and Ne-ha-lum tribes, the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians. The petition does not allege and the proof does not show the names of the various tribes and bands from which the last-mentioned three confederated tribes were formed, or which of
77 said predecessor tribes and bands of these confederated tribes had ratified treaties with the Government and which predecessor tribes had not.

The allegations of the petition are, therefore, not sufficient under the terms of the jurisdictional act and the rules of this court to constitute a cause of action against the United States by the last-mentioned seven tribes, made parties plaintiff in the petition, and, notwithstanding this defect in the petition, the evidence submitted is not sufficient to show that any of these seven tribes have a legal or equitable claim for compensation against the United States.

The claims which seem to be made on behalf of these seven plaintiff tribes and, also, one phase of the claims made on behalf of the tribes and bands of plaintiffs Tillamooks, Coquilles, Too-too-to-neys, and Chetcos appear to be grounded upon the assertion made in proposed findings and

briefs of plaintiffs that by the Executive Order of November 9, 1855, the Coast Reservation, consisting of an area 120 miles north and south along the coast of Oregon by 20 miles east and west, composed in part of lands to which the bands of the Tillamooks formerly owned and held original Indian title, was, by the terms of the Executive Order, legally and permanently created as a reservation for the sole exclusive use and occupancy of the Coast, Umpqua, and Willamette Valley tribes of Indians; that the placing on said reservation of Indians not belonging to the Coast, Umpqua, or Willamette tribes constituted a taking in part of the lands legally belonging to said Coast tribes; and, also, that the reductions as set forth in the findings of said originally defined Coast Reservation by Executive Order of December 21, 1865 and the act of Congress of March 3, 1875 constituted an unlawful taking without just compensation of lands belonging to said Coast and Umpqua tribes of Indians. It is admitted that the Willamette tribes were not placed on the reservation.

These contentions made on behalf of all plaintiffs with respect to beneficial ownership (other than rights based on original Indian title) through alleged exclusive use and occupancy rights in and to the whole of the Coast Reservation, as described under Executive Order of November 9,
78 1855, cannot be sustained under the terms and conditions of that Executive Order, and the conditions under and the extent to which Congress subsequently in 1875 recognized and ratified said Executive Order.

The unratified treaty dated August 11, 1855, mentioned in clause (b) of the jurisdictional act, which was made with and signed by the tribes and bands of Tillamooks, Sinslaus (Siuslaw), Umpquas, Kowes Bay (Coos Bay), Coquilles, Too-too-to-neys, and the Chetcos, undertook to cede outright to the United States, for the considerations mentioned therein, all lands to which these tribes and bands claimed original Indian title; and it contained a provision immediately following such cession, in art. 1, that so much of the country described therein as ceded as was contained in certain boundaries subsequently specified "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, and such other bands or parts of bands as may, by direction of the President of the United

States, be located thereon." Then followed the provision that "Such tract for the purpose contemplated shall be held and regarded as an Indian reservation, to wit: * * *. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use of such Indians as are, or may hereafter be, located thereon; * * *." The intent and purpose of these provisions was to make the whole of such "reservation" public land of the United States subject to use for Indian purposes, to the extent deemed advisable, subject to future reduction; and even if this treaty had been ratified the original tract referred to as a residence or reservation would have been subject to reduction without compensation since under the terms of the cession it would have belonged entirely to the United States and set apart, as stated, for the Indians "until otherwise directed." The Executive Order of November 9, 1855, issued after the treaty had been signed, and all actions thereunder treated this land as public land.

When various other treaties made with various Indian tribes in Oregon were transmitted to the Senate in 1855 for consideration and action, the treaty of August 11, 1855
79 with certain of the tribes and bands above-mentioned was accidentally and unintentionally overlooked and not transmitted to the Senate until February 11, 1857. In the meantime, and during the period April 18 to October 29, 1855, as shown in finding 13, General Palmer, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office recommended to the Secretary of the Interior for the approval of the President the conditional creation of "A large reservation of land, for the Coast, Umpqua, and Willamette Tribes of Indians of Oregon Territory, as shown by the blue shaded lines on the enclosed diagram taken from the general map" received by the Commissioner of Indian Affairs from General Palmer. The map referred to is in evidence as exhibit 14 to stipulation No. 1. General Palmer had recommended the creation of this conditional reservation on April 18, before he negotiated the 1855 treaty in August. When he made the treaty, the conditional reservation therein mentioned conformed substantially with his earlier recommendation. The proposed conditional reservation was recommended and created in anticipation that Indian title to the land included therein would be purchased from and

ceded by the Indians by the treaty to be negotiated with them and would be, after the issuance of such order, treated as public land of the United States temporarily in use for Indian purposes.

In a letter of October 29, 1855 to the Secretary of the Interior (finding 13), the Commissioner of Indian Affairs explains in detail that the authority for creation of the proposed conditional reservation by Executive Order was simply a withdrawal of land from public settlement for the time being.

In a letter of November 8, 1855, the Secretary of the Interior submitted to the President for his approval a "proposed reservation for Indians on the coast of Oregon Territory" as had been recommended, and further stated to the President as follows:

> Before submitting the matter to you I desired to have a full report of the subject from the Indian Office, and the letter of the head of that Bureau of the 29th ultimo having been received and considered, I see no objection to the conditional reservation asked for, subject to future
> 80 curtailment if found proper, or entire relief thereof should Congress not sanction the object rendering this withdrawal of the land from white settlement at this time advisable.

The Executive Order of November 9, 1855, issued pursuant to and in accordance with this letter, stated that "The reservation of the land within the blue shaded lines is hereby made for the purposes indicated in the letter of * * * the Secretary of the Interior of the 8th November 1855."

It will be seen from the above that the reservation of land for Indians was, as stated in the Executive Order, a conditional reservation or a withdrawal of public land from white settlement, subject to future curtailment or reduction if found proper by the President or to entire withdrawal as a reservation for Indians should Congress not sanction, as advisable, the object which rendered the withdrawal from white settlement of the land within the area of the reservation described.

Subsequent actions by the President in the Executive Order of December 21, 1865, and by Congress in the acts of March 3, 1875 (18 Stat. 420), February 8, 1887 (24 Stat. 388), August 15, 1894 (28 Stat. 286, 323), and May 13,

1910 (36 Stat. 367), show that the President and the Congress at all times until 1894 regarded the original "Coast Reservation" described by the Executive Order of November 9, 1855 to be a conditional or temporary reservation for Indian purposes through withdrawal by the President of the land therein from white settlement for the time being, but subject to future curtailment or diminution for purposes of public settlement if the President or the Congress deemed it desirable or advisable to make such curtailment. Therefore none of plaintiff Indian tribes or bands placed on the Coast Reservation, including the Tillamooks tribe, became entitled under and by virtue of the terms and conditions of the Executive Order of November 9, 1855 to recover compensation as for a taking of land to which they had exclusive use and occupancy title under approval and recognition by Congress, when the Coast Reservation, as originally defined by said Executive Order, was subsequently in 1865 and 1875 curtailed or diminished. *Sioux Tribe of Indians*
81 v. *United States*, 94 C. Cls. 150, affirmed 316 U. S. 317.

Congress did not prior to 1894 recognize or approve the so-called Coast Reservation as originally created by Executive Order of November 9, 1855, or as diminished by Executive Order of December 21, 1865, and the act of March 3, 1875, *supra*, as a reservation of land for the sole and exclusive use and occupancy by the Indians thereon in such way or to such extent as would give them beneficial ownership of, or use and occupancy title to, any portion thereof, until the passage of the general allotment act of February 8, 1887, *supra*, and the acts of August 15, 1894, (28 Stat. 286, 323 (sec. 15)); May 13, 1910, *supra*, and May 18, 1916, 39 Stat. 123, 149.

On and after enactment of sec. 15 of the act of August 15, 1894, *supra*, Congress approved and recognized the Coast or Siletz reservation as it existed immediately prior thereto as beneficially belonging to the Indians thereon. After this act of August 15, 1894, approving an agreement ceding 178,840 acres for $142,600, Congress did not take any part of the reservation without compensation, but by that act and under sec. 3, act of March 3, 1871 (16 Stat. 544, 570), it recognized the reservation as belonging to the Indians thereon.

From these conclusions, it results that the Umpqua, Chinook, Clatsop, and the Ne-ha-lum tribes and the Con-

federated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians are not entitled to recover.

Moreover, and in any event, the Umpqua Tribe is not entitled to recover because it is expressly excluded under clause (b) of the jurisdictional act. The Chinook, Clatsop, and Ne-ha-lum tribes are not entitled to recover as for a taking of lands to which they may have had original Indian title for the further reason that their unratified treaties made in 1851 are not included in the jurisdictional act, and also for the reason that under the acts of June 7, 1897, 30 Stat. 62, and August 24, 1912, 37 Stat. 518, 535, they were paid various sums by Congress which were accepted by them in full of all demands or claims against the United States.

82 *Klamath and Moadoc Tribes of Indians et al.* v. *United States*, 296 U. S. 244. The Willamette Tribe of Indians or the "Confederated Bands of the Willamette Valley" as they were known and designated in a ratified treaty with them dated January 22, 1855, 10 Stat. 1143, were not brought to or placed upon the Coast Reservation, and they cannot, therefore, sue under clause (a) or (b) of the jurisdictional act or under the Executive Order of November 9, 1855.

The evidence does not show of or from what tribes or bands the Confederated Tribes of the Grand Ronde Community, the Willamette Confederated Tribes, and the Siletz Confederated Tribes, made plaintiffs herein, were composed or organized; neither does the evidence show when the Indians, from which the so-called Confederated Tribes of the Grand Ronde Community and the Siletz Confederated Tribes were organized, were moved to or placed upon the Coast Reservation, other than that the Rogue River and Chasta Indians, who appear to have belonged to the so-called Siletz Confederated Tribes, were placed thereon in May 1857.

The petition is therefore dismissed as to the following plaintiffs: The Umpqua, Chinook, Clatsop, and Ne-ha-lum tribes, the Confederated Tribes of the Grand Ronde Community, Oregon, the Willamette Valley Confederated Tribes of Indians, and the Siletz Confederated Tribes of Indians.

The next question involves the right of the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes to recover compensation on the basis of original Indian title to the lands which they claim the Government took in November 1855, or soon thereafter.

Counsel for defendant do not deny that the United States took Indian title to the lands involved to the extent that the Indians may have had such title, but they contend, first, that if it be assumed that each of the four tribes above-mentioned has proven original Indian title through use and occupancy to the exclusion of other Indian tribes of the lands claimed by them they are not entitled to recover compensation therefor for the reason that no right, title, or interest in, to, or upon the whole or any part of such
83 lands as against the sovereign rights of the United States may be acquired by an Indian tribe or be recognized by the court as a basis for judgment in the absence of specific Congressional recognition of beneficial ownership through original title; and, that the United States has never recognized any of these plaintiffs as having such a right, title, or interest in, to, or upon any lands so occupied by them. In support of this contention counsel cites, among others, the opinions of this court in *Coos Bay Indian Tribes et al.* v. *United States*, 87 C. Cls. 143; *Duwamish et al.* v. *United States*, 79 C. Cls. 530; and *The Wichita Indians et al.* v. *United States*, 89 C. Cls. 378, 416.

Before analyzing these cases we will discuss the above contention in the light of other decided cases and the history of the aboriginal right or title of Indian tribes in and to property exclusively possessed by them, as uniformly recognized by the United States.

The contention of counsel for defendant is but another way of saying that an act authorizing suit on original Indian title simply provides a forum and that Indians cannot recover compensation from the United States as for a taking of their original possessory title to lands unless such title to the area, with respect to which claim is made, has been expressly recognized or conceded by the United States through some treaty, agreement, or act of Congress.

From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensa-

tion for having been deprived by the United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is a "question of fact to be determined as any other question of fact." *United States, as Guardian of the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Rail-Road Co.*, 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States*, 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530. *The Crow Nation or Tribe of Indians of Montana* v. *United States*, 51 C. Cls. 238; *The Wichita Indians, et al.* v. *United*

84

States, supra; and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. —. And even if the proof is sufficient, in a case where the right to sue is limited to claims arising under or growing out of treaties, to show that the tribe or tribes concerned had original Indian title through use and occupancy to the exclusion of other Indian tribes, the court cannot enter judgment on the basis of such original title. *The Northwestern Bands of Shoshone Indians* v. *United*
85 *States, supra; Duwamish, et al.* v. *United States, supra; The Wichita Indians, et al.* v. *United States, supra.*

Ever since the Government of the United States was first established the United States through its legislative and executive departments has, with one qualified exception in the case of the Indians of California, consistently conceded and recognized that Indians had a beneficial possessory ownership in lands used and exclusively occupied by them, notwithstanding general consent to be sued by the Indians on the basis of such original occupancy title or on a treaty title was not given. *Johnson and Graham's Lessee* v. *William M'Intosh*, 8 Wheat. 543; *Cramer et al.* v. *United States*, 261 U. S. 219; *United States* v. *Santa Fe Pacific R. R. Co., supra.*

In practically all instances the special consent given by Congress from time to time to particular tribes to sue the United States has been limited to claims arising under or growing out of treaties, agreements, or acts of Congress, but in *Johnson* v. *M'Intosh, supra*, the court held, p. 574, that the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." This case further pointed out that the character of the Indians inhabiting this country and their mode of life and subsistence were such that it was not practicable for them to be incorporated with the people of the victorious nation that had discovered and was taking possession of the continent and become

subjects, or citizens, of the Government, with whom they were connected, in accordance with the general rule dictated by humanity and a wise policy which requires "that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers."

86 The hundreds of treaties and agreements made with Indian nations or tribes, commencing as early as 1778, all indicate to a greater or lesser degree, a complete recognition by the United States of the legal principle established by the cases last-above cited. The provisions of sec. 8, art. 1 of the Constitution giving to Congress power to regulate commerce with the Indian tribes and the practice of the Government over a long period of years in making treaties with such tribes under sec. 2, art. 2 of the Constitution seem to have been predicated upon the principle that the Indians had a beneficial ownership in lands occupied, used, and exclusively possessed by them, and that such right of occupancy through aboriginal possession should, in order to give the United States full legal ownership, be extinguished by purchase through ratified treaties, agreements, or acts of Congress made and enacted pursuant to the power of Congress over the property and affairs of Indian tribes for their benefit.

In *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 345–347, the court said:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad*, *supra*.
>
> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U. S. 219, 227. This policy was first recog-

nized in *Johnson* v. *M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *Holden* v. *Joy*, 17 Wall. 211; *Butts* v. *Northern Pacific Railroad*, *supra*; *United States* v. *Shoshone Tribe*, 304 U. S. 111. As stated in *Mitchel* v. *United States*, *supra*, p. 746, Indian "right of occupancy is considered as sacred as the fee simple
87 of the whites." Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer* case involved the problem of individual Indian occupancy, this Court state that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." (p. 227.) Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *M'Intosh*, *supra*, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations, including Spain, that, like other rules governing titles to property (*United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486–487) they should now be considered no longer open. * * *.

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

If, in a suit by Indians against the United States pursuant to a special jurisdictional act, evidence of direct recognition by the United States that the Indians had property rights or a beneficial ownership in lands based on original Indian title through exclusive possession and occupany of such lands were necessary, it would be sufficient in the case at bar to point to the act of August 14, 1848, 9 Stat. 323, which made all land laws of the United States applicable to the Territory of Oregon thereby created, and in section 1 stated that nothing therein contained "shall be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, * * *." Further, in an opinion on

the question of original Indian title to lands and the right of settlement thereon as public lands, the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299), stated and held that "There is one other idea suggested by the
88 Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law."

The United States, of course, possessed power, whether or not its action was just and legal from the standpoint of fundamental property rights of Indians, to deprive the Indians, by force or otherwise, of their property rights in and beneficial ownership of lands occupied by them, and to move them about as it pleased, and in the absence of a consent by the United States to be sued the courts cannot interfere or adjudicate a claim for compensation on the basis of such action; the only recourse of the Indian in such a case being to petition Congress for relief. But the situation is entirely different where, as in a case like the present one, Congress has given the consent of the United States to be sued on claims for compensation based on original Indian title or rights in, to, or upon lands occupied by them arising under or growing out of such action by the United States. When such consent to be sued has been given, ordinary principles of law and equity, so far as applicable, govern the rights of the parties.

It will be found upon analysis that the cases in this court hereinabove mentioned and chiefly relied upon by the defendant do not support the contention that recovery cannot be had on the basis of original Indian title unless and until Congress has specifically recognized such title.

The jurisdictional act in the *Coos Bay Indian Tribes et al., supra*, chiefly relied upon by defendant, like clause (b) of the jurisdictional act in the present case, authorized the Indians to bring suit on claims growing out of original Indian title, and the court assumed in deciding the case

that if plaintiff tribes had established by sufficient evidence such original Indian title through exclusive use and
89 occupancy they would be entitled to recover compensation but held that the evidence submitted in that case was not sufficient to establish such title to the area claimed, or to any definite portion thereof. The statement by the court in its opinion that the United States had never recognized the Coos Bay and other Indian tribes, plaintiffs in that suit, as the aboriginal owners of lands to which they made claim had reference to the proposition that since plaintiffs had not established aboriginal use and occupancy title they were not otherwise entitled to recover as for a taking of such lands by the Government, because the Government had not specifically recognized by treaty, agreement, or act of Congress, beneficial ownership of the Indians through their exclusive right to use and occupy the whole or any portion of the lands for which claim was made.

In the case of *The Duwamish et al. Tribes*, *supra*, the suit was brought under a jurisdictional act, sec. 1 of which provided for adjudication of claims arising under or growing out of certain treaties or acts of Congress, and did not authorize the prosecution of a claim based on aboriginal Indian title. The portion of the opinion in that case relied upon by counsel for defendant discussed sec. 2 of the jurisdictional act which the Indians claimed had enlarged the jurisdiction conferred by sec. 1, and simply pointed out that the Indians as a tribe were *vested with no right to sue the United States* for the taking of their lands until subsequent to the conclusion of treaties which fixed their landed domain, and *only then by special jurisdictional acts of Congress* in cases where allegations prevailed that treaty-stipulations had not been observed, or that acts of Congress had deprived them of lands included in their reservations. The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title.

The opinion in the case of the *Wichita Indians*, *supra*, held that the claims asserted under certain treaties or acts of

Congress, as authorized by the jurisdictional act, could
90 not, on the evidence, be sustained, and that a claim based solely on aboriginal Indian use and occupancy title was not within the terms of the jurisdictional act.

In the case of *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, in which the jurisdictional act authorized suit on the basis of original Indian title, we held that the Indians would be entitled to recover for the taking of their lands if they were able to prove that they held original title through exclusive use and occupancy, but it was held that they had not proved such exclusive occupancy title.

We are therefore of opinion that plaintiffs Tillamook, Coquille, Too-too-to-ney, and Chetco tribes are entitled as a matter of law to recover compensation if they have proven by satisfactory evidence that they held and owned original Indian occupancy title to the exclusion of other Indian tribes to the lands of which they were deprived and which were taken by the United States without payment of compensation, and this is the final question in the case. Counsel for defendant, relying upon the *Coos Bay et al.* case, *supra*, contend that original Indian title has not been established by the proof.

From a careful study of the evidence submitted, a great deal of which is documentary, we are of opinion that these four tribes have satisfactorily established original Indian title through exclusive use and occupancy in 1855, and long prior thereto, to the lands specifically described in findings 8, 9, and 10.

On this question, counsel for the Government contend that although defendant is satisfied that the four tribes mentioned were living during and prior to 1855 in the general area of the lands claimed by them, defendant does not concede that these plaintiffs, or any of them, exclusively occupied the lands which they claim in such a manner or to such an extent as would create or would be considered a possession, either actual or constructive.

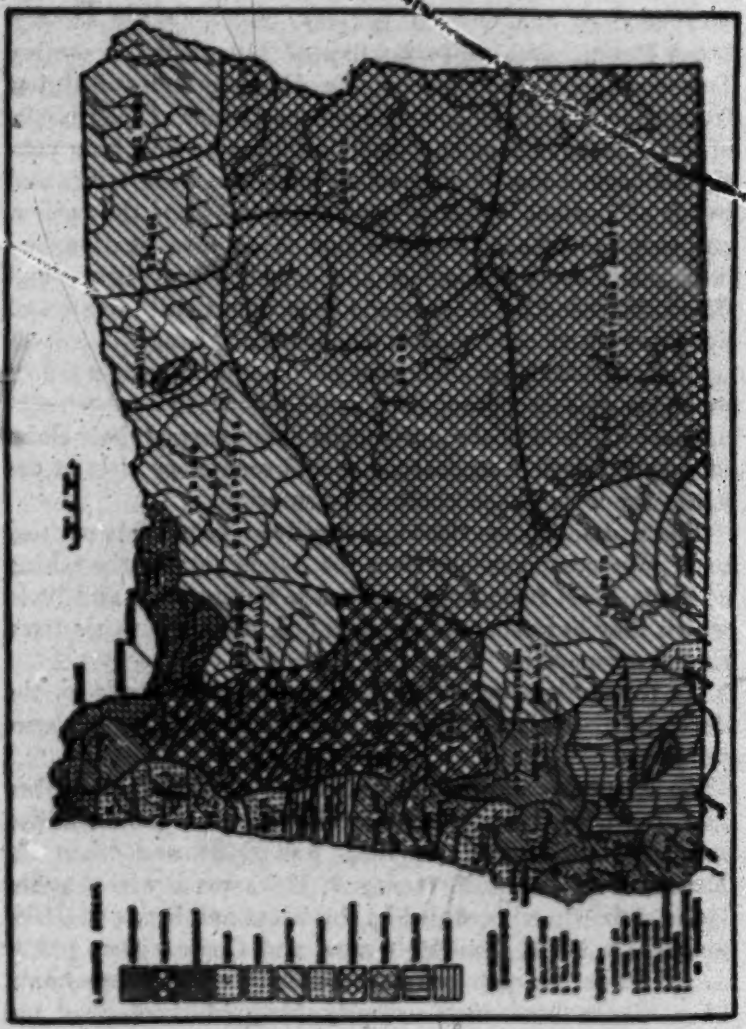
The four plaintiffs above mentioned have submitted a great deal more and much stronger evidence than was before the court in the *Coos Bay* case in which the court had to rely principally upon oral testimony which it found insufficient to

establish the claimed original title through exclusive
91 use and occupancy. No useful purpose would be served by discussing in detail the evidence submitted in this case—reference to the principal portions thereof will be sufficient.

The investigations and reports made and submitted in 1855 by Indian Superintendent Joel Palmer under and pursuant to direction and instruction of the President, through the Commissioner of Indian Affairs, substantially support the claim made by the Tillamooks, Coquille, Too-too-to-ney, and Chetco tribes in respect of the lands for which they claim compensation and to which they claim to have held original Indian title in 1855 and long prior thereto. He found and reported that these tribes and bands occupied areas with definite boundaries, and the proof which has been submitted in this case satisfactorily shows where these definite boundaries were with respect to the tribes composed of the bands mentioned in the petition. General Palmer's investigations and reports not only recognized the extent of occupancy by these tribes, but he also concluded that by such occupancy they had acquired original Indian title. Other evidence which has been submitted in the case fully supports this view and further shows that as far back as history can be traced, at least to 1750, there had been practically no change in location of plaintiff tribes and bands along the Oregon Coast, and east to the Coast Range Mountains; and that these tribes and bands held, occupied, and used such lands within rather definite boundaries to the exclusion of and in recognition by other tribes and bands. The proof satisfactorily shows that plaintiff tribes of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos lived upon, claimed, and occupied these lands in Indian fashion to the extent that Indian tribes and bands usually exclusively used and occupied lands prior to 1855 and as far back as the history of these tribes and bands can be traced.

The written report prepared by the Secretary of the Interior in the case at bar from the records and documents in the possession of the Government, which report is filed as evidence in this case, states that the lands which the Indians undertook to cede in the unratified treaty of August 11, 1855, and for which these plaintiffs make claim, appear to have been in the exclusive possession of the Indians.

92 A map showing tribal distribution of Indians in Oregon, including the Coast tribes, among which were plaintiffs Tillamook, Coquille, Too-too-to-ney, and the Chetco, prepared by the American Anthropological Association after investigation and study of the history of these Indian tribes, is reproduced below:



93 The conclusion reached by this Association from its investigation and research, as disclosed by its official

records, shows that this tribal distribution represented a fairly stable condition which had existed from about 1750.

In addition to the foregoing, we have in this case the testimony of Dr. John P. Harrington of the Smithsonian Institution, an eminent ethnologist of a quarter of a century of service in the Bureau of American Ethnology, in connection with the investigations and studies he had made and completed of the Oregon Indians, including the Oregon Coast Indians and plaintiff tribes of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos. Dr. Harrington testified that from an investigation and study of the history of the Indians of the Oregon Coast and their holdings he had been convinced beyond any shadow of a doubt that these tribes and bands of Indians which fringed the Coast were the ancient and original inhabitants, and that if an investigation had been made centuries before the expedition of Lewis and Clark the tribal holdings would have been to all intents and purposes where they were at the dawn of history.

The defendant has submitted no evidence to contradict or overcome this strong and direct evidence which has been submitted on behalf of these plaintiffs in support of their claim of original Indian exclusive use and occupancy title of the lands for which they claim compensation.

These plaintiffs are therefore legally and equitably entitled to recover compensation from the defendant for the taking of lands, as set forth and described in findings 8, 9, and 10, to which they have shown they held original Indian title from time immemorial.

As to the date or dates of taking of these lands by the defendant, the following is established by the evidence submitted:

To all intents and purposes, and as a matter of established fact, the United States considered soon after the unratified treaty dated August 11, 1855, was made and when the Executive Order of November 9, 1855, was issued that the lands claimed and occupied by the tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos were public lands for such purposes as the United States might
94. desire to use them—namely, for public homestead and settlement, and for temporary use for Indian purposes.

The executive officers of the Government, of course, thought and assumed that the treaty which was being negotiated, and which was made and signed with these four tribes between August 11 and September 8, 1855, and before the Executive Order of November 9, 1855, would be ratified by the Senate but they did not await ratification before taking the lands, but proceeded immediately after the treaty was signed to regard and to treat the lands claimed by the Tillamooks, Coquilles, Too-too-to-neys, and the Chetcos as public lands open to public homestead and settlement, except as conditionally withdrawn and reserved by the Executive Order of November 9, 1855. This action, subsequently confirmed by Congress, was a taking of the lands and the original Indian use and occupancy title. Such action was not altered but was confirmed and continued when it became known that the treaty dated August 11, 1855, would not be ratified. Such actions were known to, acquiesced in, and ratified by Congress, as hereinafter set forth.

The tribes and bands of the Coquilles, Too-too-to-neys, and the Chetcos were entirely moved off their lands about November 9, 1855, or soon thereafter, and placed on a portion of the land to which the tribe and bands of Tillamooks held original Indian title. The lands of the Coquille, Too-too-to-ney, and Chetco tribes were therefore unquestionably taken at that time.

The bands composing plaintiff Tillamooks tribe were not altogether moved off their land, but they were moved and confined to the conditional reservation created by the Executive Order of November 9, 1855, along with other Indians of various other tribes and bands, and such of the land of the Tillamooks tribe as lay east of the eastern boundary of this conditional reservation was taken November 9, 1855. This conditional reservation for Indian purposes was, as has been stated, composed in part of a portion of the land to which plaintiff tribe and bands of Tillamooks held original Indian title and which they continued to occupy jointly with other Indians; this land of the Tillamooks was also taken by the United States at the same time the other lands above-
mentioned were taken. The land composing the reser-
95 vation was treated and regarded from November 8,
1855 as public land of the United States subject to be opened for public settlement as the President or Congress

might direct, and most of it was subsequently so opened for settlement.

The above-described actions of the Executive officers of the Government, dating from November 9, 1855, in carrying out the Executive Orders of 1855 and 1865, were ratified and confirmed by Congress by the passage of the act of March 3, 1875, 18 Stat. 420. This ratification of the 1855 and 1865 Executive Orders confirmed the original taking as of November 9, 1855. The land originally belonging beneficially to the tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos through original Indian title was therefore taken on November 9, 1855. *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 82 C. Cls. 23, 299 U. S. 476; and 85 C. Cls. 331, 304 U. S. 111.

The compensation to which these tribes are entitled should therefore be measured by the value of the lands described in findings 8, 9, and 10 on that date, plus an additional amount measured by a reasonable rate of interest to make just compensation. However, these four tribes are not legally and equitably entitled to recover the entire value above mentioned, since those values must be offset as of November 9, 1855 by the values as of that date of their interests in the land comprising the reservation on August 15, 1894, of which interests the Indians of these tribes then became the beneficial owners through recognition by Congress on the basis of allotments in severalty which had been made and on the basis of population as to unallotted lands or proceeds therefrom. In effect, and for all practical purposes, these Indians, so far as their right to compensation is concerned, had had these occupancy interests (first recognized on August 15, 1894, as being exclusive as against the United States) in the land of the reservation from the date of taking in November 1855, but the extent of such interests were, until 1894, uncertain, indefinite, and legally indeterminable until Congress by the act of August 15, 1894, ratifying an agreement of purchase by the United States of a portion of the then existing reservation, recognized the Indians on the then existing reserva-
96 tion as being the beneficial owners thereof. This act of 1894 was a recognition by ratification as of Novem-

ber 9, 1855 of such interests as the Indians had in 1894, and which interests they had actually enjoyed through occupancy since 1855. The values as of November 9, 1855 of such interests as these plaintiffs had on August 12, 1894 are therefore proper legal and equitable offsets against the values of the lands taken in November 1855.

Although the Tillamooks originally held Indian title to their interest in the reservation as it existed in 1894, such title had been taken in 1855, but they were not deprived of possession to the extent of that interest, and their exclusive use and occupancy title to such interest again became vested and determinable in 1894.

As to the Coquilles, Too-too-to-neys, and the Chetcos, their exclusive use and occupancy interests in the reservation, which became vested by recognition in 1894, represented an equitable consideration in part for their lands which had been taken by the Government in 1855, and which interests they had enjoyed through actual occupancy since the date of taking of their lands about November 9, 1855.

Judgments for the amount of compensation to which plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos may be entitled and the determination of the amount of offsets, in addition to those above-mentioned, if any, are reserved for further proceedings under rule 39 (a).

It is so ordered.

MADDEN, *Judge;* and WHITAKER, *Judge*, concur.
WHALEY, *Chief Justice*, dissents.
JONES, *Judge*, took no part in the decision of this case.

99 *Judgment of the Court*

April 2, 1945

Upon the findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs, the tribes and bands of the Tillamooks, the Coquille, the Too-too-to-ney, and the Chetco, are entitled to recover. Judgment as to the amount of recovery and the amount of offsets, if any, is reserved for further proceedings under Rule 39 (a).

The court further concludes as a matter of law that plaintiffs Umpqua Tribe, Chinook Tribe, Clatsop Tribe, Ne-ha-lum Tribe, Confederated Tribes of the Grand Ronde Community, Oregon, Willamette Valley Confederated Tribe, and the Siletz Confederated Tribe are not entitled to recover, and the petition is dismissed as to these tribes.

101 *Proceedings after entry of judgment*

On May 28, 1945, the defendant filed a motion for a new trial.

On June 4, 1945, the court entered the following order on said motion:

ORDER

It is ordered this 4th day of June, 1945, that the defendant's motion for new trial be and the same is hereby overruled.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

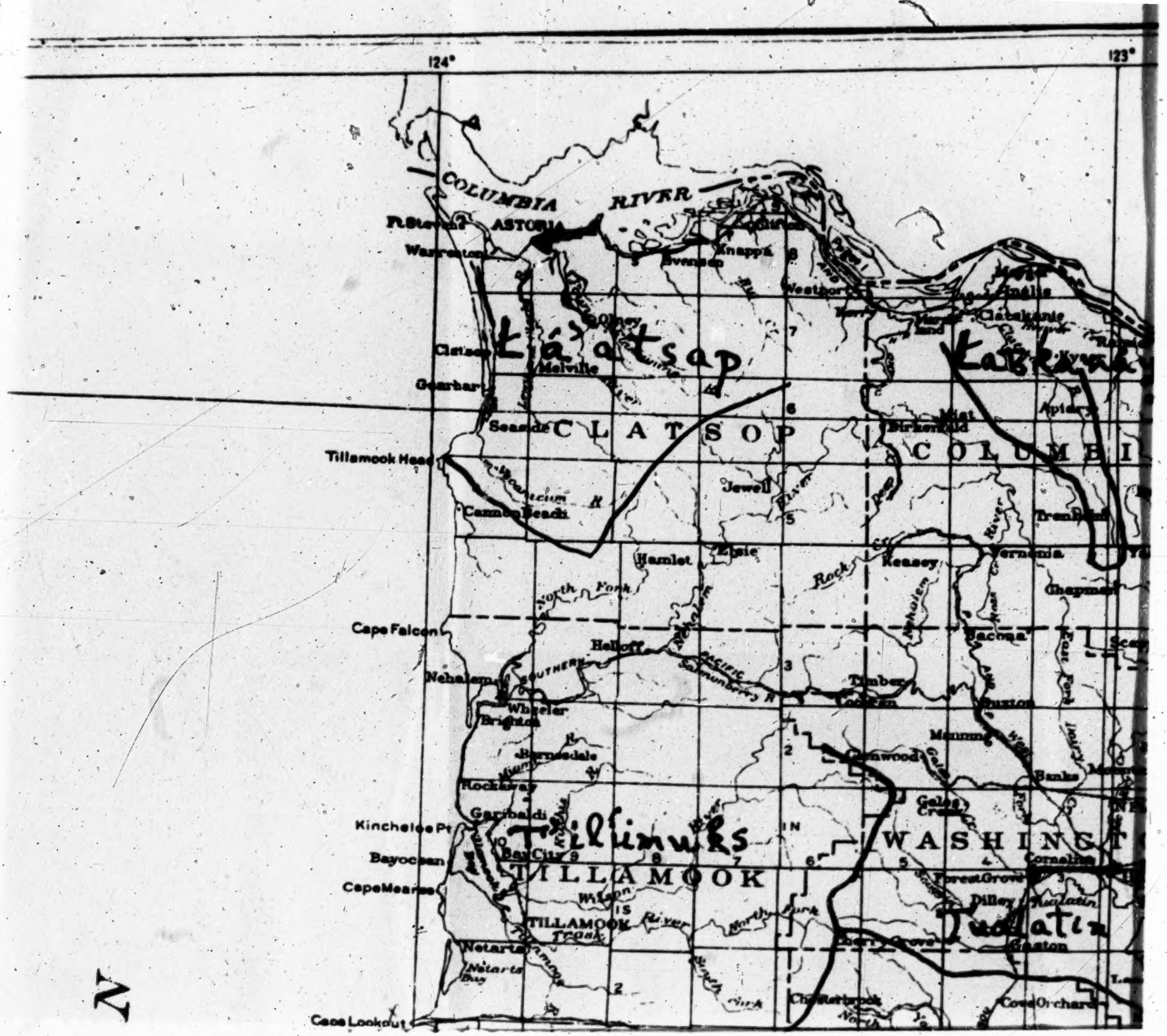
Order allowing certiorari

Filed October 22, 1945

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

672600—45 U. S. GOVERNMENT PRINTING OFFICE: 1945


124°
123°
COLUMBIA RIVER
Ft. Stevens
ASTORIA
Warrenton
Knappa
Svensen
Westport
Clatskanie
Olney
Clatsop
Clatsop
Gearhart
Melville
Seaside
CLATSOP
COLUMBIA
Tillamook Head
Jewell
Cannon Beach
Hamlet
Elsie
Keasey
Vernonia
Cape Falcon
Helloff
Nehalem
Timber
Tacoma
Wheeler
Brighton
Barnesdale
Rockaway
Garibaldi
Kinchelo Pt
Tillamuks
Bay City
Bayocean
TILLAMOOK
Cape Meares
Wilson
TILLAMOOK
River
Trask
Netarts
Netarts Bay
Cape Lookout
Manning
Glenwood
Banks
Gales Creek
WASHINGTON
Forest Grove
Cornelius
Dilley
Tualatin
Gaston
Cove Orchard
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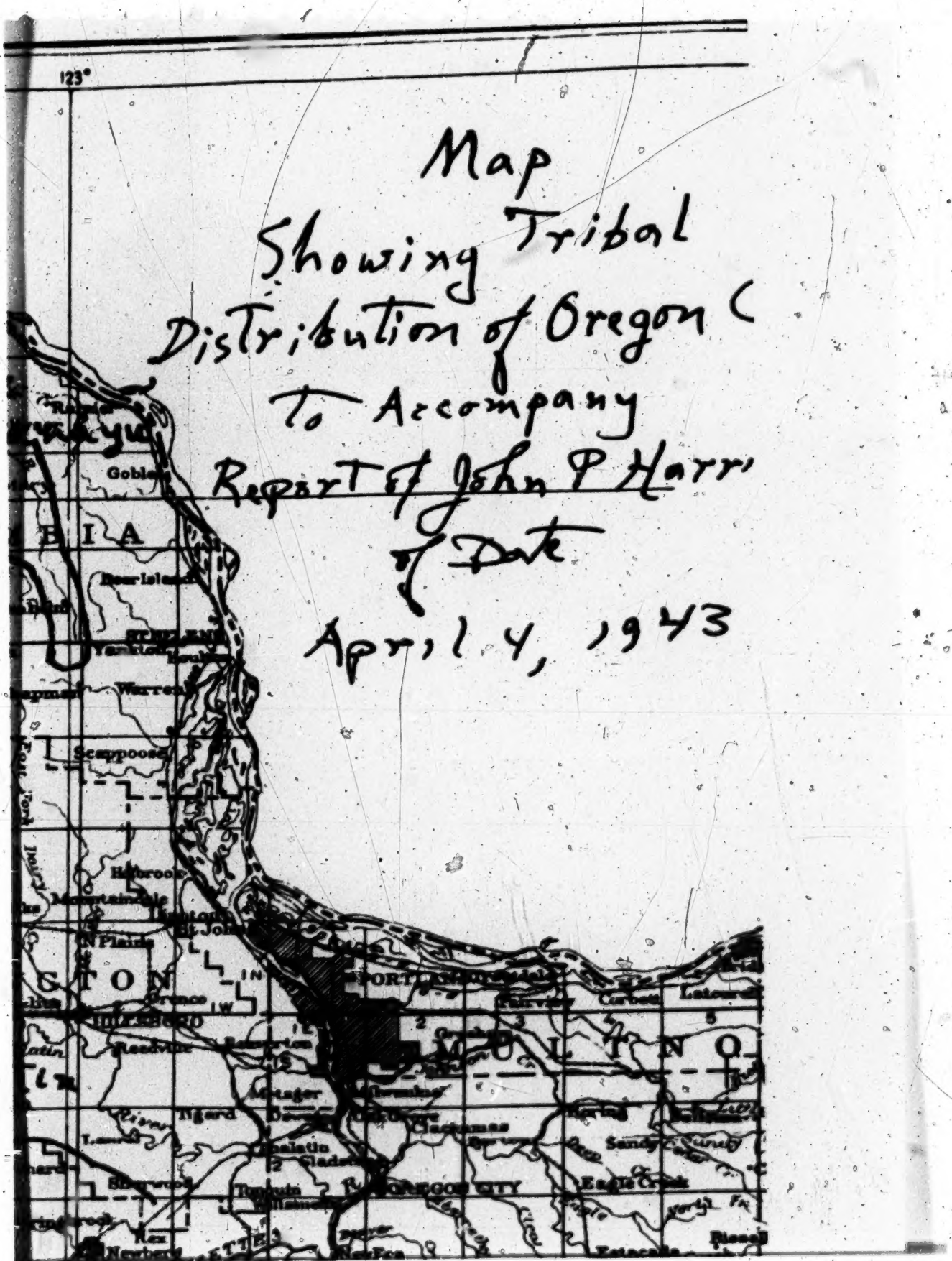

Map
Showing Tribal
Distribution of Oregon C
to Accompany
Report of John P Harr
of Date
April 4, 1943

C O C E A N
Cape Foulweather
Yaquina Head
Cascade Head
Cape Lookout
Newport
Yaquina
Toledo
Waldport
Otis
Neskowin
Oceanside
Netarts
Tillamook
Bay City
Pacific City
Beaver
Hebo
Woods
Cloverdale
Siletz
Logsden
Valsetz
Salmon River
Grand Ronde
Willamina
Sheridan
Dayton
Lafayette
Dundee
Carlton
Yamhill
Amity
McMinnville
Whiteson
Sheridan
Dallas
Falls City
Monmouth
Rickreall
Independence
Buena Vista
Ballston
Perrydale
McCoy
Sidney
Turner
Aumsville
Stayton
Sublimity
Scio
Jefferson
Scravel Hill
Lacomb
Crabtree
Brownsville
Halsey
Harrisburg
Shedd
Tangent
Albany
Sodaville
Lebanon
Waterloo
Berlin
Holley
Sweet Home
Foster
Green Peter
Middle Santiam
Quartzville
Gates
Detroit
Idanha
Mehama
Stayton
Scotts Mills
Silverton
Mt. Angel
Gervais
Woodburn
Hubbard
Aurora
Donald
Butteville
Wilsonville
Canby
Molalla
Oregon City
Gladstone
West Linn
Lake Oswego
Tualatin
Sherwood
Newberg
Dundee
Dayton
Lafayette
Yamhill
Carlton
Amity
Sheridan
Willamina
Grand Ronde
Valsetz
Siletz
Logsden
Toledo
Otis
Waldport
Yaquina
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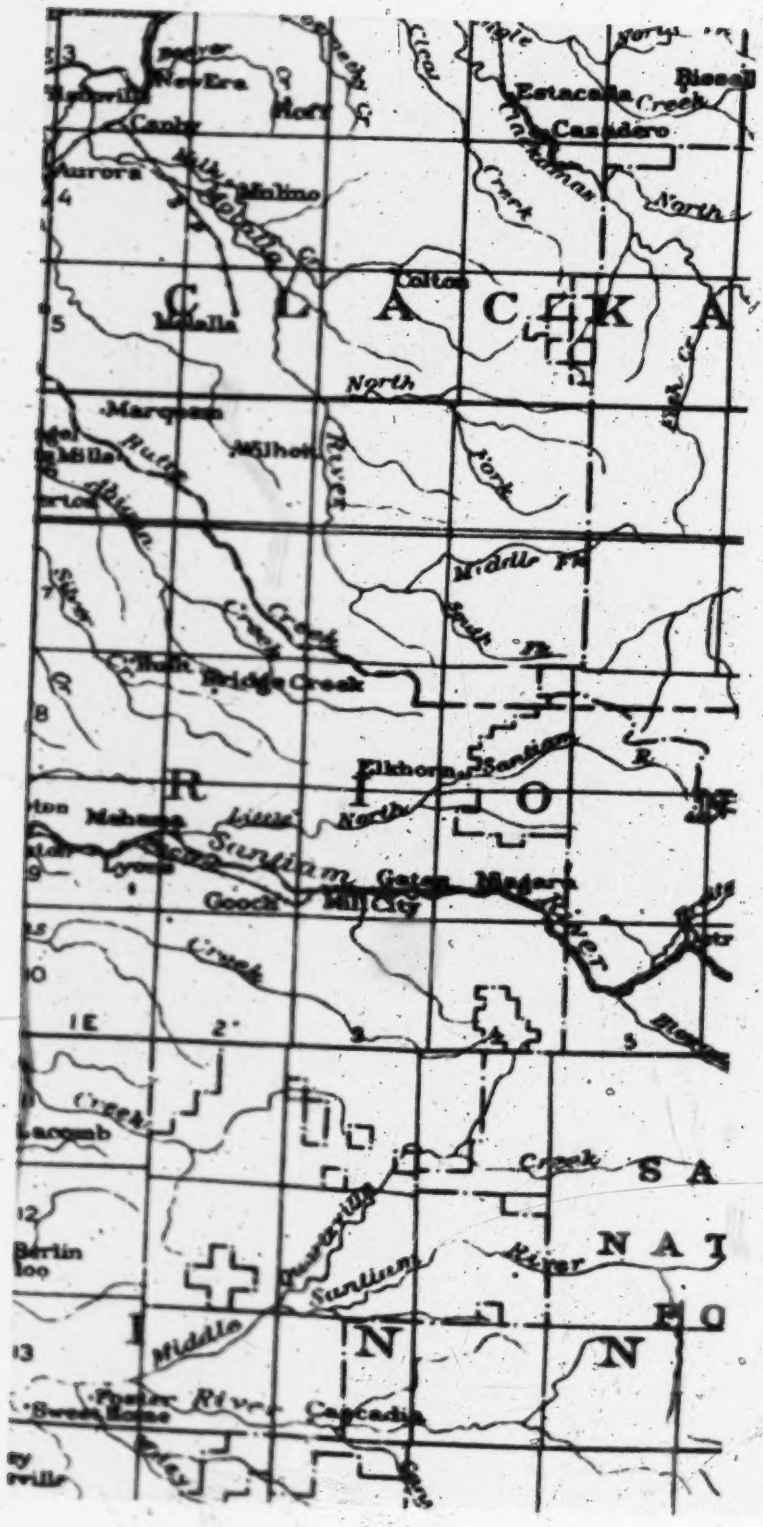
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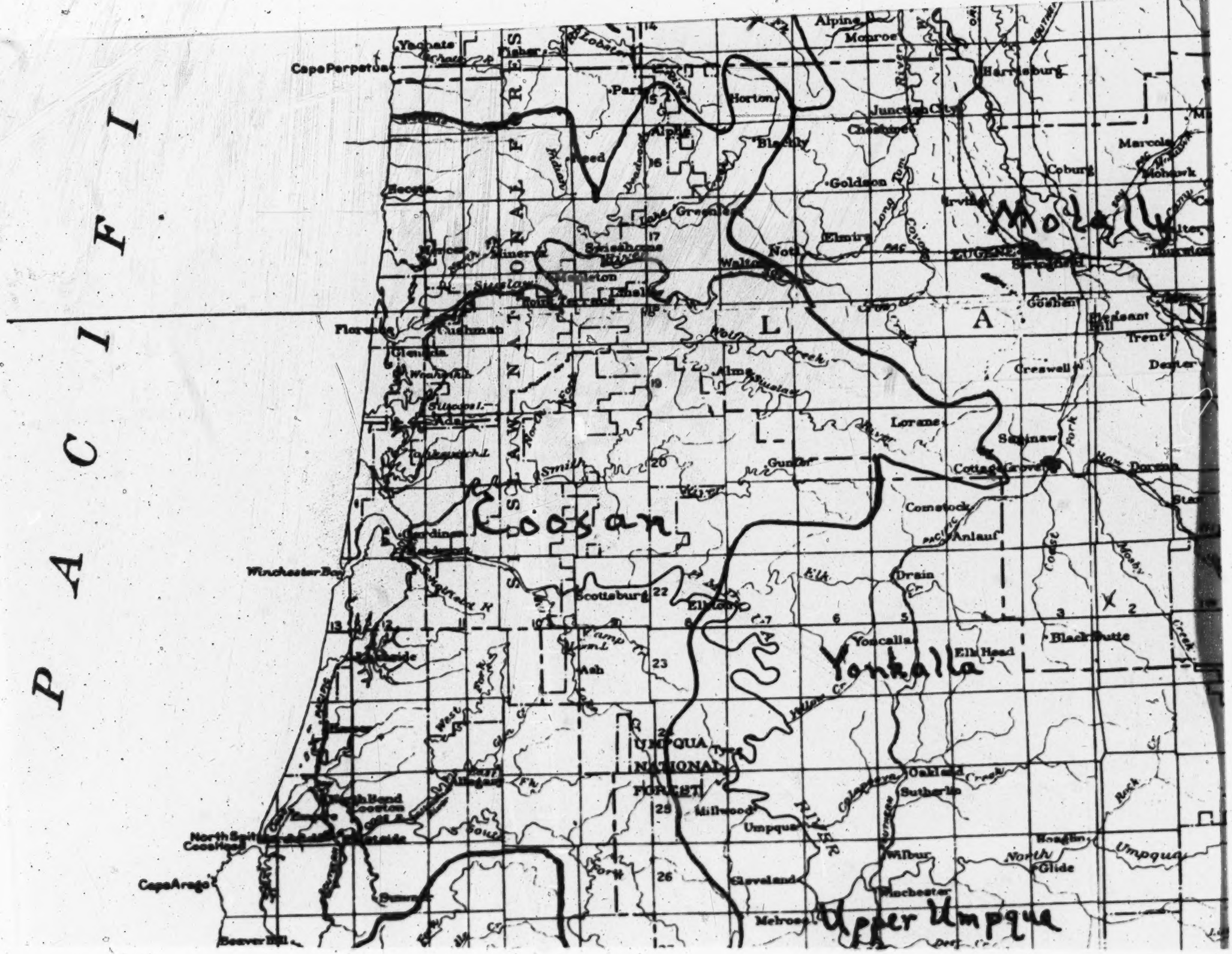
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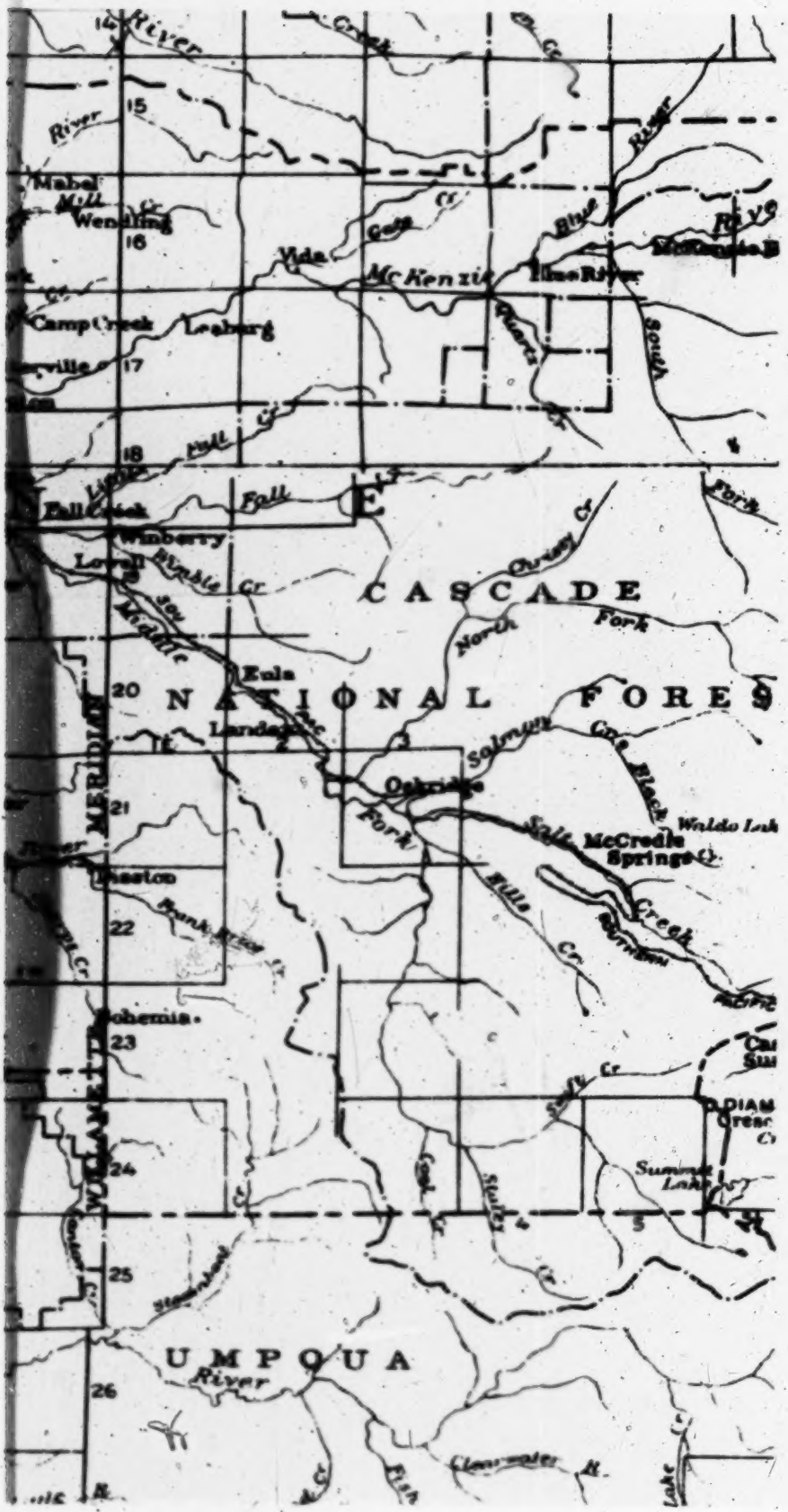
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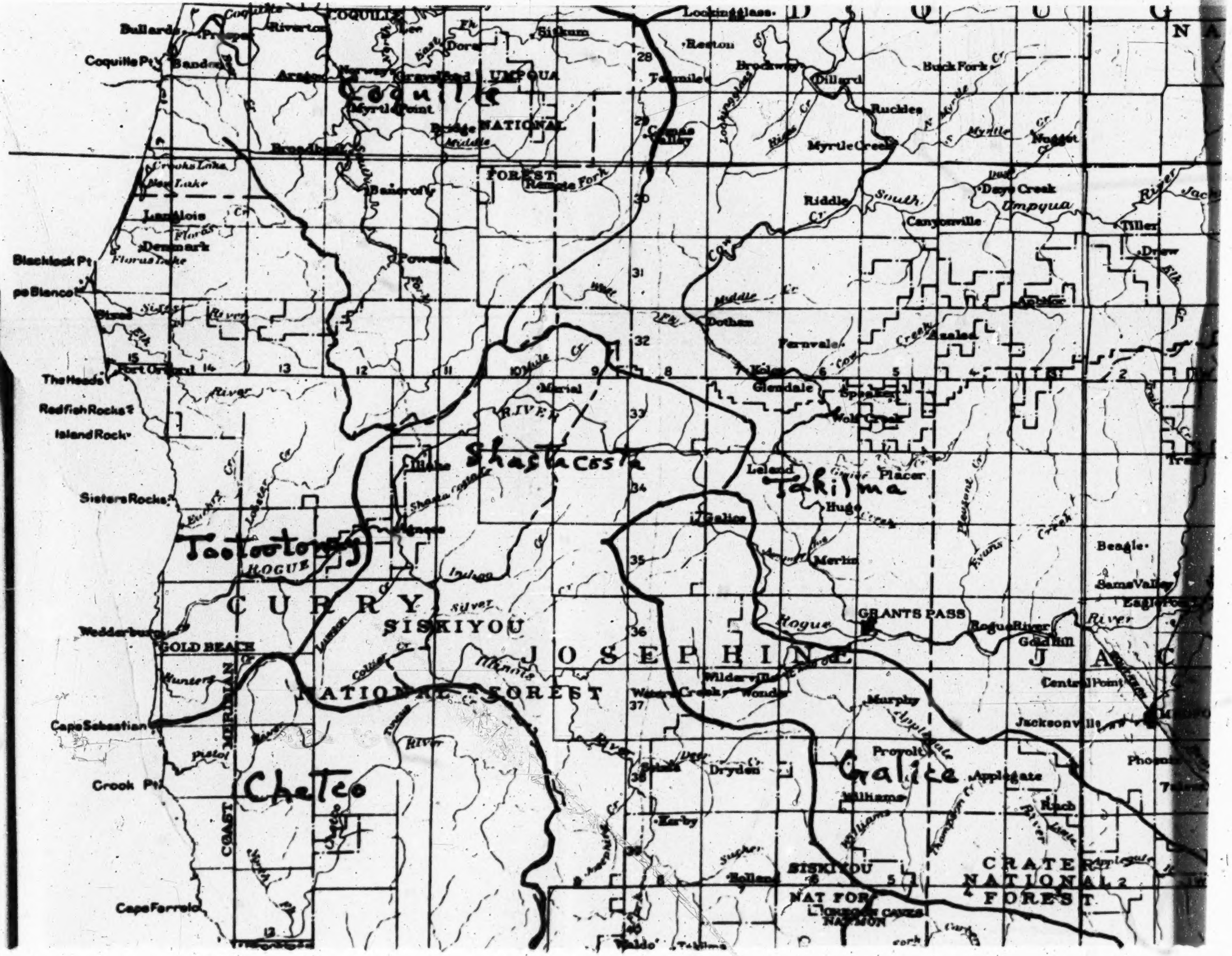
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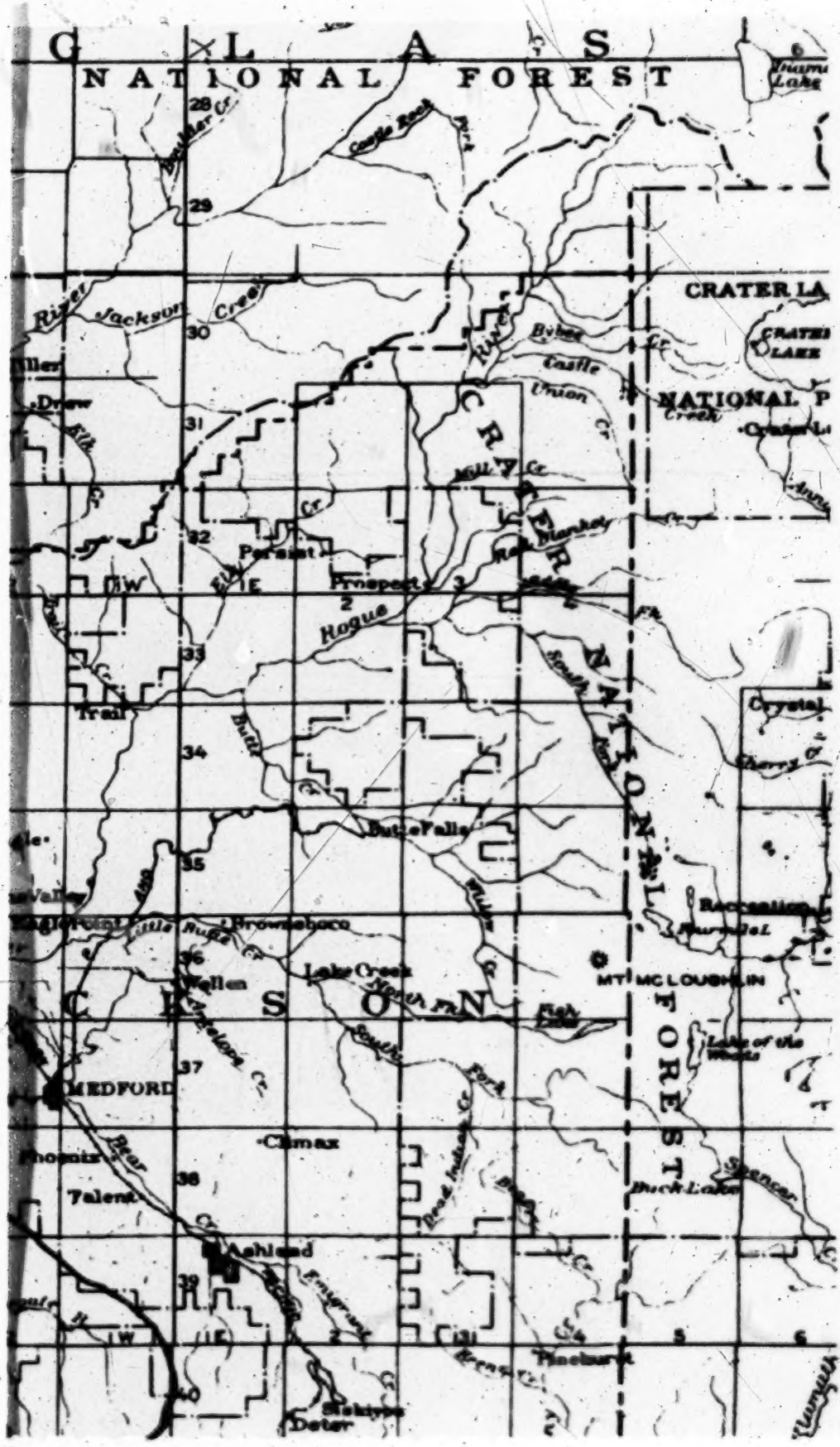
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No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	10
Conclusion	16

CITATIONS

Cases:	
Assiniboine Indian Tribe v. *United States*, 77 C. Cls. 247	11
Beecher v. *Wetherby*, 95 U. S. 517	13
Buford v. *Houtz*, 133 U. S. 320	14
Butz v. *Northern Pacific Railroad*, 119 U. S. 55	13
Clark v. *Smith*, 13 Pet. 195	12
Conley v. *Ballinger*, 216 U. S. 84	13
Coos Bay Indian Tribe, et al. v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653	11
Cummings v. *Deutsche Bank*, 300 U. S. 115	13
Duwamish, et al. Indians v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755	11
Frizbie v. *Whitney*, 76 U. S. 187	14
Indians of California v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764	11
Johnson v. *McIntosh*, 8 Wheat. 543	13
Northern Pacific Railroad Co. v. *Smith*, 171 U. S. 260	14
Osborne v. *United States*, 145 F. 2d 892	14
Shoshone Indians v. *United States*, 324 U. S. 335	12, 15
Shoshone Tribe v. *United States*, 299 U. S. 476	10
Turner v. *United States*, 248 U. S. 354	10
United States v. *Mille Lac Chippewas*, 229 U. S. 498	10
United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339	12, 13, 14, 15
Wichita Indians, et al. v. *United States*, 89 C. Cls. 378	11
Statutes:	
Act of August 14, 1848, 9 Stat. 323	3, 8, 15
Act of June 5, 1850, 9 Stat. 437	5
Act of March 3, 1875, 18 Stat. 420	6, 15
Act of August 15, 1894, 28 Stat. 286	7, 15
Act of August 26, 1935, 49 Stat. 801	2, 4, 10

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Miscellaneous:

	Page
Cohen, *Handbook of Federal Indian Law* (1941), p. 294	13
Executive Order of November 9, 1855	6
Executive Order of December 21, 1865	6
Report of Commissioner of Indian Affairs (1894), p. 267	7
Rule 39 (a) of the Court of Claims	9
Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645	5
S. Rep. No. 795, 74th Cong., 1st sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 387

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS, ET AL.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 2, 1945, by the Court of Claims.

OPINION BELOW

The opinion of the Court of Claims (R. 61–83) is reported in 59 F. Supp. 934.

[1] Besides the Alcea Band of Tillamooks, the respondents are the Yah-Quo-Nah, Seletca and Ne-A-Ches-Na Bands of Tillamooks; the Quans-Sake-Nah; Klen-Nah-Hah, Ke-Ah-Mas-E-Ton, Cah-Toch, Chin-Chen-Ten-Tah-Ta, Whiston, and Klen-Hos-Tun Bands of Nas-O-Mahs or Coquilles; the Chetco Tribe; the Ko-Se-E-Chah, Se-Qua-Chee, Too-Too-To-Ny, Yah-Shute, Whis-To-Natin, Cos-Sa-To-Ny, Chet-Less-Ing-Ton, Port Orford, Eukie-Chee, Kus-So-To-Ny, Kler-It-La-Tel, Te-Cha-Quot, and Mack-A-No-Tin Bands of Too-Too-To-Neys; and portions and descendants of all such tribes and bands (R. 1).

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The jurisdiction of this Court is invoked under Section 1 of the jurisdictional Act of August 26, 1935, 49 Stat. 801, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the extinguishment of unrecognized original Indian title by the United States creates a legal or equitable obligation so that respondents could recover under the special jurisdictional Act.

2. Whether respondents' original Indian title was formally recognized by the United States.

STATUTES INVOLVED

The pertinent portions of the jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (D) [in] any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their

appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

SEC. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.

Section 1 of the Act of August 14, 1848, 9 Stat. 323, "An Act to establish the Territorial Government of Oregon," provides in part:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of

> the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

Other statutes are set out in the findings of the Court of Claims.

STATEMENT

Pursuant to the Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, which conferred jurisdiction on the Court of Claims to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," tribes or bands of the Tillamook, Coquille, Too-Too-To-Ney, and Chetco Indians brought this suit to recover compensation for the alleged taking of lands in which the tribes asserted possessory rights by virtue of original Indian title, as opposed to a recognized right of occupancy (R. 1–20).[2] Each of the four tribes, who lived principally along the rivers and creek banks (Finding 11, R. 39), alleged title solely by virtue of exclusive occupation and use to large areas in the State of Oregon between the Pacific Ocean and the Coast Range of Mountains (R. 4, 5–6). According to statistics of the General Land Office

[2] Several other tribes also joined in the suit, but since the claims of these Indians have been dismissed for various reasons (R. 61, 62–69), only the claims of the Tillamooks, Coquilles, Too-Too-To-Neys, and Chetcos are involved in this petition for certiorari.

of the Department of Interior, the territory so claimed by the Tillamooks (Finding 8, R. 37) has been estimated to embrace approximately 1,152,410 acres (see Finding 5, R. 35), while that claimed by the Coquilles (Finding 10, R. 38–39) consists of about 722,530 acres. The area occupied by the Too-Too-To-Neys and Chetcos (Finding 9, R. 37–38) has been estimated as approximately 897,640 acres.[3] The claims of the four tribes were based upon the following facts as found by the Court of Claims:

In 1855, acting under the authority of the Act of June 5, 1850, 9 Stat. 437, the Superintendent of the Oregon Indian Agency negotiated a treaty with respondents and other tribes (Findings 2, 3, 4, R. 24–25, 28, 32). By this treaty the Indians agreed to cede to the United States all the lands to which they claimed title, provided that a described portion of the ceded lands be set aside "until otherwise directed by the President" as a residence for the signatory Indians and "such other bands or parts of bands as may, by direction of the President of the United States, be located thereon" (Finding 3, R. 29). The agreement also provided for cash payments and the undertaking of other

[3] In 1855 the Too-Too-To-Neys, Chetcos, and Coquilles had an aggregate population of about 1,311 (Finding 5, R. 35), while the Tillamooks numbered about 200. See Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645. Thus, the alleged holding of the Tillamooks averaged about 5,750 acres for each member of the tribe, while for the four tribes the average was approximately 1,800 acres.

obligations by the United States as consideration for the cession (Finding 3, R. 30–31). This treaty was never ratified by the Senate (Findings 2, 4, R. 26, 32–34). However, by Executive Order of November 9, 1855, a conditional reservation, to be subject to future curtailment if found proper, was set aside for the use of those Indians who had signed the treaty and such other tribes as the President might designate (Finding 13, R. 40–47). This reservation, known as the Coast or Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west and contained approximately 1,100,000 acres (Finding 15, R. 48). This tract was composed in part of a portion of the lands exclusively occupied by bands of Tillamooks, and its boundaries were almost the same as those of the reservation described in the treaty (Findings 12, 16, R. 39, 48). Respondent bands and other tribes were immediately removed to the reservation (Findings 3, 12, 19, 37, R. 28, 39, 49–50, 59–61), and the remaining lands in the area described in the treaty were opened for settlement as public lands of the United States (Finding 18, R. 49).

By Executive Order of December 21, 1865, a strip of approximately 320,000 acres was withdrawn from the center of the reservation and was immediately opened for settlement, the Indian occupants being removed to the diminished reservation (Finding 21, R. 50–51). By the Act of March 3, 1875, 18 Stat. 420, 446, Congress ratified the Executive Orders of 1855 and 1865 and further

diminished the reservation by withdrawing tracts located at the north and south ends of the original reservation (Finding 22, R. 51–52). The Indian occupants were removed to portions of the diminished reservation, and the newly withdrawn lands were opened for settlement (Finding 22, R. 52). Up to this time respondents had not received any compensation for the lands to which they claimed original Indian title (Findings 12, 19, R. 39–40, 50).

After 1887 allotments of land were made to Indians of respondent and other tribes who were permanently located on the diminished Siletz Reservation (Finding 23, R. 53).[4] Thereafter, in 1892 the United States and the tribes residing on the reservation entered into an agreement, subsequently ratified by the Act of August 15, 1894, 28 Stat. 286, 323, by which the Indians ceded 178,840 acres, all the unallotted lands except for 5 sections within the diminished reservation, for a consideration of $142,600, part of which was immediately paid to the Indians per capita, with the balance of $100,000 being deposited at interest in the Treasury to the credit of the various bands located on the reservation (Finding 23, R. 53). These ceded lands were opened for settlement early in 1895 (*idem.*). In 1900 Congress provided for the distribution of the $100,000 on deposit,

[4] Only 594 Indians, including members of respondent bands and other tribes, claimed allotments. Report of Commissioner of Indian Affairs (1894), p. 267.

together with accrued interest, to individual Indians residing on the reservation (Finding 24, R. 53). In 1910 Congress authorized the sale of the remaining 5 sections, and in 1916 the proceeds of such sale, after deductions for expenses incurred, were distributed per capita to enrolled members of the resident tribes (Findings 25, 26, R. 53–54).

Under these circumstances the United States contended that it had not recognized or acknowledged that respondent tribes or bands had any right of occupancy in the areas claimed by them, that consequently respondents had no legal or equitable interest in the lands as against the United States, and that, therefore, the court had no jurisdiction to award recovery for the extinguishment of the Indian title. The Court of Claims overruled this contention, being of the opinion that even absent a recognition of a right of occupancy, respondents had such a legal interest in lands exclusively occupied from time immemorial that the lands could not be taken by the United States without payment of just compensation therefor (R. 70–77). The court also held that even if direct recognition of Indian title were necessary to support recovery, the requisite recognition was furnished by the Act of August 14, 1848, 9 Stat. 323, *supra*, pp. 3–4, which declared that the rights of Indians to property in Oregon were protected until extinguished by the United States (R. 74–75).

The Court of Claims found that each of respondent tribes possessed Indian title, by virtue of exclusive occupancy from time immemorial, to areas with clearly defined boundaries as alleged in the petition (Findings 6, 7, 8, 9, 10, 11; R. 35–39). The court also found that these lands had been taken by the United States for a public purpose on or shortly after the issuance of the Executive Order of November 9, 1855, without the payment of just compensation (Findings 17, 18, 34, R. 49, 58), and concluded that the tribes were entitled to recover (R. 61). It was indicated that the recovery was to be measured by the value of the lands as of November 9, 1855, plus interest at a reasonable rate, but that this recovery should be offset by the value as of November 9, 1855, of those portions of the reservation in which the tribes were recognized to have had a beneficial interest through allotments in severalty and the distribution per capita of the proceeds of the unallotted lands remaining on the reservation as it existed in 1894 (R. 82–83). On April 2, 1945, an interlocutory judgment was entered holding respondents entitled to recover, but the determination of the amount of recovery and the amount of any offsets was reserved for further proceedings under Rule 39 (a) of the Court of Claims (R. 84).[8] The opinion, entered the same day, was

[8] Rule 39 (a) of the Court of Claims provides:

"In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first

written by Judge Littleton, Chief Justice Whaley dissenting without opinion and Judge Jones taking no part (R. 83). On June 4, 1945, a motion by the United States for a new trial was denied (R. 84).

REASONS FOR GRANTING THE WRIT

1. In arriving at its decision that respondents were entitled to recover, the Court of Claims assumed that the jurisdictional Act, conferring as it did jurisdiction to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," authorized the entry of judgment for compensation if the claim of Indian title at and long prior to 1855 should be established (R. 21). This assumption is contrary to the established precedents of this Court, for it is well settled that a special jurisdictional Act does not admit any legal liability, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Turner* v. *United States*, 248 U. S. 354, 358; *Shoshone Tribe* v. *United States*, 299 U. S. 476,

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instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

493. The meager legislative history of the present Act indicates that no deviation from the settled rule of construction was intended, but that respondents were merely to be afforded an opportunity for a judicial determination as to whether any legal rights were violated by the extinguishment of their original Indian title. S. Rep. No. 795, 74th Cong., 1st. sess. Hence, it is clear that no implication of liability can be drawn from the special jurisdictional Act.

2. This case is the first in which it has been held that the United States was under a legal obligation to make compensation for the extinguishment of original Indian title, as opposed to a formally recognized right of occupancy.[8] The holding was

[8] Although the United States has several times submitted to suit on claims based solely on original Indian title, until the present decision it had never been determined that the United States had violated any legal rights by destroying such title. In three cases the Court of Claims found it unnecessary to pass upon the Government's liability as a matter of law because of the holding that Indian title had not been established by the evidence. *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 414. (Cf. R. 75–77 for a discussion of these cases.) But in *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 532, 597–603, certiorari denied, 295 U. S. 755, the court apparently flatly held as the first ground for dismissal that even where the jurisdictional Act covered claims based on original Indian title, no recovery could be had absent recognition of such title. (Cf. R. 76 for a contrary interpretation of this opinion.) In *The Indians of California* v. *United States*, 98 C. Cls. 583, 599, certiorari denied, 319 U. S. 764,

based upon the reasoning that Indian title was just as much protected against action of the United States as was a recognized right of occupancy, so that it could be extinguished only by purchase (R. 70–73). However, it is submitted that, although the Fifth Amendment may require compensation for the deprivation of a formally recognized right of occupancy (see *Shoshone Indians* v. *United States,* 324 U. S. 335, 340), the extinguishment of original Indian title creates at most only a moral obligation.

"Since *Johnson* v. *M'Intosh,* 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss." *Shoshone Indians* v. *United States,* 324 U. S. 335, 339. As a political matter, the right of occupancy proceeding from Indian title was protected until determined by the United States. *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345; *Clark* v. *Smith,* 13 Pet. 195, 201. But, although as to private individuals Indian title was as sacred as the fee of the whites, its extinguish-

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recovery was granted, but this was on the basis of a provision in the jurisdictional Act declaring that "the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief."

ment by the Government raised political rather than justiciable issues. This was so whether the title be determined by treaty, purchase, the sword, or the exercise of complete dominion adverse to the Indian claim. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; *Johnson* v. *McIntosh*, 8 Wheat. 543, 586. In its dealings with Indian title, as Mr. Justice Holmes stated, the United States "bound itself only by honor, not by law." *Conley* v. *Ballinger*, 216 U. S. 84, 90; see also *Beecher* v. *Wetherby*, 95 U. S. 517, 525; cf. *Cummings* v. *Deutsche Bank*, 300 U. S. 115. Hence, on long-established principles respondent tribes had no such legal interest in the lands here involved as to require compensation when devoted to a public purpose.

Because the Indians may have had rights protected by the courts against interference by private individuals, it does not follow that they had legal or equitable rights against the United States. The situation is not unique. At the time of the alleged taking, the fee to the lands involved was in the United States, while respondents had merely an unrecognized right of occupancy which was subject to determination by the Government. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 56; see Cohen, *Handbook of Federal Indian Law* (1941), p. 294. Thus, respondents were in the

same position as persons impliedly licensed to graze their stock on the public lands or to take possession of lands not yet opened to settlement. Such persons, although having enforceable rights against others, had no legal or equitable rights protected against the acts of the sovereign owner. *Buford* v. *Houtz*, 133 U. S. 320; *Osborne* v. *United States*, 145 F. 2d 892 (C. C. A. 9); *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260; *Frisbie* v. *Whitney*, 76 U. S. 187, 194.

The court below (R. 73–74) principally relied upon language of this Court in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. But in the portion quoted, this Court was speaking of the rights as against third parties, not as against the United States. Immediately following the language relied upon by the court below, this Court stated (314 U. S. at p. 347): "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." Thus, rather than supporting the decision of the Court of Claims, the *Santa Fe* case is contrary to it.

3. The Court of Claims attempted to buttress its decision by holding that in any event the Act

of August 14, 1848 (*supra*, pp. 3–4) amounted to a recognition of the Indian title (R. 74). But that statute, as appears when the sentence partially quoted by the court is read in its entirety, is nothing more than a declaration of the historic policy of protecting Indian title against encroachment by settlers and other private interests, with a complete reservation of all the Government's rights. The language used manifestly is not sufficient to support a finding of recognition. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335. The court's reliance upon an 1855 opinion of the Attorney General (R. 74–75) is subject to the same criticism, and in addition it is not clear how the Attorney General can be substituted for Congress in formally recognizing Indian title. Moreover, the court's holding that the 1848 Act amounted to a recognition is obviously inconsistent with its finding (Finding 35, R. 58; see R. 82–83) that Congress had not recognized any tribal rights in the 1855 Siletz Reservation until 1894.[7] If the Act of

[7] The Act of August 15, 1894, 28 Stat. 286, 323, sec. 15, ratified the Indians' 1892 cession to the United States of all unallotted land within the Siletz Reservation with the exception of 5 sections (R. 53). This action constituted a relinquishment by the respondents of all claims to lands outside the five sections—a voluntary extinguishment of Indian title. Cf. *United States* v. *Sante Fe Pacific R. Co.*, 314 U. S. 339, 356–358. The remaining 5 sections were sold pursuant to Congressional authorization in 1910 and the proceeds were distributed to members of the resident tribes (see Statement, *supra*, p. 8).

March 3, 1875 (R. 51–52) was not a recognition by Congress of definite rights in the reservation, surely the 1848 Act cannot be said to be a recognition of Indian title in any specified area.

4. The questions presented are of large importance to the United States and to Indian tribes such as respondents whose claims to rights of occupancy have never been recognized by treaty, agreement, or statute. The decision in the present case newly, and, we believe, mistakenly, places upon the Government a great liability, which might become enormous under similar jurisdictional Acts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.

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No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	10
Summary of argument	11
Argument:	
I. The United States is not liable to make compensation for the extinguishment of unrecognized Indian title	14
A. The jurisdictional Act did not create the liability	16
B. There is no liability under either the Fifth Amendment or any other rule of law	19
II. Respondents' original Indian title has not been formally recognized	33
Conclusion	37
Appendix	38

CITATIONS

Cases:	
Assiniboine Indian Tribe v. *United States*, 77 C. Cls. 347, certiorari denied, 292 U. S. 606	31
Barker v. *Harvey*, 181 U. S. 481	14, 21, 26, 27
Blackfeather v. *United States*, 190 U. S. 368	18
Boecher v. *Wetherby*, 95 U. S. 517	24, 25, 28
Brooks v. *Dewar*, 313 U. S. 354	35
Buford v. *Houtz*, 133 U. S. 320	30
Buttz v. *Northern Pacific Railroad*, 119 U. S. 55	23
California & Oregon Land Co. v. *Worden*, 85 Feb. 94	27
Cherokee Nation v. *Georgia*, 5 Pet. 1	28
Chippewa Indians v. *United States*, 301 U. S. 358	25
Clark v. *Smith*, 13 Pet. 195	22
Conley v. *Ballinger*, 216 U. S. 84	24
Cummings v. *Deutsche Bank*, 300 U. S. 115	24
Duwamish, et al. Indians v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755	32
Fletcher v. *Peck*, 6 Cranch 87	22
Frisbie v. *Whitney*, 76 U. S. 187	30
Johnson v. *M'Intosh*, 8 Wheat. 543	21, 22, 23, 9
Kinkead v. *United States*, 150 U. S. 483	
Lamb v. *Davenport*, 85 U. S. 307	35

677841—46——1

Cases—Continued Page

Leavenworth &c. R. R. Co. v. *United States*, 92 U. S. 733.. 28
Light v. *United States*, 220 U. S. 523..... 30
Lone Wolf v. *Hitchcock*, 187 U. S. 553..... 28
Martin v. *Waddell*, 16 Pet. 367..... 21, 22
Maydole v. *Watson*, 7 Idaho 66..... 30
Mitchel v. *United States*, 9 Pet. 711..... 25, 28
Northern Pacific Railroad Co. v. *Colburn*, 164 U. S. 383..... 30
Northern Pacific Railroad Co. v. *Smith*, 171 U. S. 260.. .. 30
Osborne v. *United States*, 145 F. 2d 892..... 30
Price v. *United States and Osage Indians*, 174 U. S. 373.... 18
Randall v. *United States*, 71 C. Cls. 152..... 17
Russian-American Co. v. *United States*, 199 U. S. 570..... 31
Schillinger v. *United States*, 155 U. S. 163..... 33
Shoshone Indians v. *United States*, 324 U. S. 335.. 12, 14, 15, 20, 22, 23, 26, 33, 35
Shoshone Tribe v. *United States*, 299 U. S. 476.... 15, 17, 25, 28, 34
Sioux Tribe v. *United States*, 316 U. S. 317..... 23, 37
Stanton v. *United States*, 68 C. Cls. 379..... 17
Tarpey v. *Madsen*, 178 U. S. 215..... 30
Taylor v. *Woodward*, 10 Cal. 90..... 30
The Indians of California v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764..... 18
The Oyster Cases, 94 C. Cls. 397..... 17
The Sac and Fox Indians, 220 U. S. 481..... 17, 24
Tiger v. *Western Investment Co.*, 221 U. S. 286..... 35
Turner v. *United States*, 248 U. S. 354..... 17
United States v. *Cook*, 19 Wall. 591..... 28
United States v. *Creek Nation*, 295 U. S. 103..... 25, 26
United States v. *Esnault-Pelterie*, 299 U. S. 201..... 34
United States v. *Klamath Indians*, 304 U. S. 119..... 25, 27, 31
United States v. *Mille Lac Chippewas*, 229 U. S. 498..... 11, 17
United States v. *Old Settlers*, 148 U. S. 427..... 17, 24
United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339.. 12, 15, 16, 20, 22, 23, 29, 36
United States v. *Seminole Nation*, 299 U. S. 417..... 34
United States v. *Shoshone Tribe*, 304 U. S. 111..... 28
Wamble v. *Evans*, 23 Ariz. 307..... 30
Worcester v. *Georgia*, 6 Pet. 515..... 23, 25

Constitution and Statutes:

U. S. Const., Amend. V..... 19, 25, 27
Act of August 14, 1848, 9 Stat. 323..... 3, 9, 34, 35, 36, 37
Act of June 5, 1850, 9 Stat. 437..... 5, 35
Act of March 3, 1875, 18 Stat. 420, 446..... 7, 36
Act of August 15, 1894, 28 Stat. 286, 323..... 4, 7, 36, 38
Act of May 18, 1928, 45 Stat. 602..... 18
Act of August 26, 1935, 49 Stat. 801..... 2, 4, 11, 14
Treaty with the Sac and Fox Indians of 1842, 7 Stat. 596. 28
Treaty with Poncas Indians of March 12, 1858, 12 Stat. 997. 28
Treaty with Sioux Tribe of 1868, Art. 2, 15 Stat. 635..... 28

Miscellaneous: Page

Cohen, *Handbook of Federal Indian Law* (1942), pp. 62–63, 65, 291–305 ..... 24, 31
Executive Order of November 9, 1855 ..... 6, 7, 9
Executive Order of December 21, 1865 7
H. Rep. No. 1085, 74th Cong., 1st sess 18
Lawrence, *Principles of International Law* (7th ed. 1923), pp. 148–149 ..... 21, 23
Moore, *International Law Digest* (1906) pp. 258-259 21
7 Op. A. G. 293, 299 ..... 36, 37
Report of Commissioner of Indian affairs (1864) p. 267 7
Rule 39(a) of the Corrt of Claims 10
Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645 5
S. Rep. No. 795, 74th Cong., 1st sess 18
Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) pp. 106-107 21

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 387

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS, ET AL.[1]

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 61–83) is reported in 59 F. Supp. 934.

[1] Besides the Alcea Band of Tillamooks, the respondents are the Yah-Quo-Nah, Seletca and Ne-A-Ches-Na Bands of Tillamooks; the Quans-Sake-Nah, Klen-Nah-Hah, Ke-Ah-Mas-E-Ton, Cah-Toch, Chin-Chen-Ten-Tah-Ta, Whiston and Klen-Hos-Tun Bands of Nas-O-Mahs or Coquilles; the Chetco Tribe; the Ko-Se-E-Chah, Se-Qua-Chee, Too-Too-To-Ny, Yah-Shute, Whis-To-Natin, Cos-Sa-To-Ny, Chet-Less-Ing-Ton, Port Orford, Eukie-Chee, Kus-So-To-Ny, Kler-It-La-Tel, Te-Cha-Quot, and Mack-A-No-Tin Bands of Too-Too-To-Neys; and portions and descendants of all such tribes and bands (R. 1).

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The petition for a writ of certiorari was filed on August 31, 1945, and was granted on October 22, 1945 (R. 85). The jurisdiction of this Court rests upon Section 1 of the jurisdictional Act of August 26, 1935, 49 Stat. 801, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the extinguishment of unrecognized original Indian title by the United States creates a legal or equitable obligation so that respondents could recover under the special jurisdictional Act.

2. Whether respondents' original Indian title was formally recognized by the United States.

STATUTES INVOLVED

The pertinent portions of the jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (b) [in] any and all legal and equitable claims arising under or growing out of the original Indian

title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation: * * *,

Section 1 of the Act of August 14, 1848, 9 Stat. 323, "An Act to establish the Territorial Government of Oregon," provides in part:

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between

> the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

The pertinent portion of the Act of August 15, 1894, 28 Stat. 286, 323, is set forth in the Appendix, *infra*, pp. 38–44. Other statutes are set out in the findings of the Court of Claims.

STATEMENT

Pursuant to the Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, which conferred jurisdiction on the Court of Claims to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," tribes or bands of the Tillamook, Coquille, Too-Too-To-Ney, and Chetco Indians brought this suit to recover compensation for the alleged taking of lands in which the tribes asserted possessory rights by virtue of original Indian title, as opposed to a recognized right of occupancy (R. 1–20).[2] Each of the four tribes, who lived principally along the rivers and creek banks (Finding 11, R. 39), alleged title solely by

[2] Several other tribes also joined in the suit, but since the claims of these Indians have been dismissed for various reasons (R. 61, 62–69), only the claims of the Tillamooks, Coquilles, Too-Too-To-Neys, and Chetcos are involved in this Court.

virtue of exclusive occupation and use to large areas in the State of Oregon between the Pacific Ocean and the Coast Range of mountains (R. 4, 5–6). According to statistics of the General Land Office of the Department of Interior, the territory so claimed by the Tillamooks (Finding 8, R. 37) has been estimated to embrace approximately 1,152,410 acres (see Finding 5, R. 35), while that claimed by the Coquilles (Finding 10, R. 38–39) consists of about 722,530 acres. The area occupied by the Too-Too-To-Neys and Chetcos (Finding 9, R. 37–38) has been estimated as approximately 897,640 acres.[3] The claims of the four tribes were based upon the following facts as found by the Court of Claims:

In 1855, acting under authority of the Act of June 5, 1850, 9 Stat. 437, the Superintendent of the Oregon Indian Agency negotiated a treaty with respondents and other tribes (Findings 2, 3, 4, R. 24–25, 28, 32). By this treaty the Indians agreed to cede to the United States all the lands to which they claimed title, provided that a described portion of the ceded lands be set aside "until otherwise directed by the President" as a

[3] In 1855 the Too-Too-To-Neys, Chetcos, and Coquilles had an aggregate population of about 1,311 (Finding 5, R. 35), while the Tillamooks numbered about 200. See Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645. Thus, the alleged holding of the Tillamooks averaged about 5,750 acres for each member of the tribe, while for the four tribes the average was approximately 1,800 acres.

677841—46——2

residence for the signatory Indians and "such other bands or parts of bands as may, by direction of the President of the United States, be located thereon" (Finding 3, R. 29). The agreement also provided for cash payments and the undertaking of other obligations by the United States as consideration for the cession (Finding 3, R. 30–31). This treaty was never ratified by the Senate (Findings 2, 4, R. 26, 32–34). However, by Executive order of November 9, 1855, a conditional reservation, to be subject to future curtailment if found proper, was set aside for the use of those Indians who had signed the treaty and such other tribes as the President might designate (Finding 13, R. 40–47). This reservation, known as the Coast or Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west and contained approximately 1,100,000 acres (Finding 15, R. 48). This tract was composed in part of a portion of the lands exclusively occupied by bands of Tillamooks, and its boundaries were almost the same as those of the reservation described in the treaty (Findings 12, 16, R. 39, 48). Respondent bands and other tribes were immediately removed to the reservation (Findings 3, 12, 19, 37, R. 28, 39, 49–50, 59–61), and the remaining lands in the area described in the treaty were opened for settlement as public lands of the United States (Finding 18, R. 49).

By Executive Order of December 21, 1865, a strip of approximately 320,000 acres was withdrawn from the center of the reservation and was immediately opened for settlement, the Indian occupants being removed to the diminished reservation (Finding 21, R. 50–51). By the Act of March 3, 1875, 18 Stat. 420, 446, Congress ratified the Executive Orders of 1855 and 1865 and further diminished the reservation by withdrawing tracts located at the north and south ends of the original reservation (Finding 22, R. 51–52). The Indian occupants were removed to portions of the diminished reservation, and the newly withdrawn lands were opened for settlement (Finding 22, R. 52).

After 1887, allotments of land were made to Indians of respondent and other tribes who were permanently located on the diminished Siletz Reservation (Finding 23, R. 53).[4] Thereafter, in 1892 the United States and the tribes residing on the reservation entered into an agreement, subsequently ratified by the Act of August 15, 1894, 28 Stat. 286, 323 (Appendix, *infra*, pp. 38–44), by which the Indians ceded 178,840 acres, all the unallotted lands except for 5 sections within the diminished reservation, for a consideration of $142,600, part of which was immediately paid to

[4] Only 594 Indians, including members of respondent bands and other tribes, claimed allotments. Report of Commissioner of Indian Affairs (1894), p. 267.

the Indians per capita, with the balance of $100,000 being deposited at interest in the Treasury to the credit of the various bands located on the reservation (Finding 23, R. 53). These ceded lands were opened for settlement early in 1895 (*idem*). In 1900 Congress provided for the distribution of the $100,000 on deposit, together with accrued interest, to individual Indians residing on the reservation (Finding 24, R. 53). In 1910 Congress authorized the sale of the remaining 5 sections, and in 1916 the proceeds of such sale, after deductions for expenses incurred, were distributed per capita to enrolled members of the resident tribes (Findings 25, 26, R 53–54).

Under these circumstances the United States contended that it had not recognized or acknowledged that respondent tribes or bands had any right of occupancy in the areas claimed by them, that consequently respondents had no legal or equitable interest in the lands as against the United States, and that, therefore, the court had no jurisdiction to award recovery for the extinguishment of the Indian title. The Court of Claims overruled this contention, being of the opinion that even absent a recognition of a right of occupancy, respondents had such a legal interest in lands exclusively occupied from time immemorial that the lands could not be taken by the United States without payment of just compensation therefor (R. 70–77). The court also held that even if direct recognition of Indian title were

necessary to support recovery, the requisite recognition was furnished by the Act of August 14, 1848, 9 Stat. 323, *supra*, pp. 3–4, which declared that the rights of Indians to property in Oregon were protected until extinguished by the United States (R. 74–75).

The Court of Claims found that each of respondent tribes possessed Indian title, by virtue of exclusive occupancy from time immemorial, to areas with clearly defined boundaries as alleged in the petition (Findings 6, 7, 8, 9, 10, 11, R. 35–39). The court also found that these lands had been taken by the United States for a public purpose on or shortly after the issuance of the Executive Order of November 9, 1855, without the payment of just compensation (Findings 17, 18, 34, R. 49, 58), and concluded that the tribes were entitled to recover (R. 61). It was indicated that the recovery was to be measured by the value of the lands as of November 9, 1855, plus interest at a reasonable rate, but that this recovery should be offset by the value as of November 9, 1855, of those portions of the reservation in which the tribes were recognized to have had a beneficial interest through allotments in severalty and the distribution per capita of the proceeds of the unallotted lands remaining on the reservation as it existed in 1894 R. 82–83). On April 2, 1945, an interlocutory judgment was entered holding respondents entitled to recover, but the determination of the amount of recovery and the amount

of any offsets was reserved for further proceedings under Rule 39 (a) of the Court of Claims (R. 84).[5] The opinion, entered the same day, was written by the Judge Littleton, Chief Justice Whaley dissenting without opinion and Judge Jones taking no part (R. 83). On June 4, 1945, a motion by the United States for a new trial was denied (R. 84).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondents were entitled to recover compensation for the taking by the United States of their unrecognized original Indian title.

2. In holding that respondents' original title had been recognized by the United States especially in the absence of a finding to support such a holding.

3. In entering judgment against the United States.

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[5] Rule 39 (a) of the Court of Claims provides:

"In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

SUMMARY OF ARGUMENT

I

The special jurisdictional Act (*supra*, pp. 2–3) under which this suit was filed, authorized the Court of Claims to adjudicate "any and all legal and equitable claims arising under or growing out of the original Indian title" asserted by respondents. "Original Indian title" is the claim by an Indian tribe of the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians, and must be distinguished from a formally recognized Indian title. In holding that respondents were entitled to recover, the court below misconceived the force of the jurisdictional Act and failed to distinguish between recognized and unrecognized original Indian title.

A

The Court of Claims assumed that the jurisdictional Act authorized the entry of a judgment for compensation merely upon the establishment of the fact of original Indian title. But a jurisdictional Act does not admit any legal liability, and merely provides "a forum for the adjudication of the claim according to applicable legal principles" (*United States* v. *Millie Lac Chippewas*, 229 U. S. 498, 500) by waiving the Government's immunity from suit. Neither the language nor the legislative history of the present

Act indicates an intention that it should be more broadly construed.

B

In holding that the United States was liable for the taking of an unrecognized Indian title in 1855, the Court of Claims considered that as against the United States, the Indians possessed the same rights under the unrecognized original title as under a recognized title, and that the unrecognized Indian title could be constitutionally extinguished only by purchase. However, although Indian title, whether recognized or not, is protected against the acts of others than the United States, unrecognized Indian title can be terminated by the sovereign at will. By discovery the European nations claimed exclusive title to the lands of the New World subject only to a temporary right of Indian occupancy, and asserted the exclusive power to extinguish the original Indian title or right of occupancy by purchase, the sword, or any other manner. The United States acquired the same title by discovery when it took over sovereignty, and its obligation upon taking Indian lands so occupied was understood at the time of the events here in question, and repeatedly characterized since, as a moral or political, not a legal, obligation. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

Historically, the United States found it advisable to enter into treaties with various Indian tribes guaranteeing to the Indians a perpetual right of occupancy, thus transforming the original Indian title into a recognized title. Such a perpetual right of occupancy is protected against an uncompensated taking by the United States. However, even though most of the Indian lands were eventually so held, the policy of enlarging Indian rights of occupancy did not of itself transform all temporary rights of occupancy into permanent rights, and lands still held under unrecognized Indian title may be taken by the United States without liability. It is only the recognized Indian title which is as sacred as the fee when the United States is involved.

Since lands occupied by Indians under original title are essentially public lands of the United States, the rights of such Indians as against the United States are no greater than those of stockmen or settlers who made use of the public lands before they were opened for purchase or homesteading.

II

The recognition necessary to support liability for a taking must be such as to amount to a guarantee of a perpetual right of occupancy to the Indians. The Court of Claims made no finding of such recognition, but in its opinion assigned as an

alternative ground for decision that respondents' original Indian title had been recognized by the United States. The 1848 statute relied upon by the court shows at most only an intention to preserve the *status quo*, and does not furnish the requisite recognition. Further, inasmuch as Congress alone may dispose of the public lands, the recognition cannot be supplied by reference to the acts of Government officials.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE TO MAKE COMPENSATION FOR THE EXTINGUISHMENT OF UNRECOGNIZED INDIAN TITLE

The jurisdictional Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, under which this suit was filed, authorized the Court of Claims to adjudicate "any and all legal and equitable claims arising under or growing out of the original Indian title" asserted by respondent tribes and bands. As this Court recently pointed out in *Shoshone Indians* v. *United States*, 324 U. S. 335, 338–339, "original Indian title" means the claim by an Indian tribe of the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians, such title to be distinguished from an Indian title which has been formally recognized, acknowledged or confirmed by the sovereign. Cf. *Barker* v. *Harvey*, 181

U. S. 481, 491–492. Hence, the principal legal issue presented by this case is whether the United States is legally liable to compensate an Indian tribe for the extinguishment or taking of an unrecognized Indian title.*

Prior to the decision below, no court has ever held the United States to be so liable. *Shoshone Indians* v. *United States*, 324 U. S. 335, 339. It is true that the Government may not constitutionally take lands held under recognized Indian title or right of permanent occupancy without making compensation therefor (*Shoshone Tribe* v. *United States*, 299 U. S. 476), and that private individuals may not with impunity interfere with a tribe's possessory rights based upon Indian title whether or not such title has been formally recognized by the sovereign. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. But such cases are quite different from the instant case either because they involved a tribal title of a different nature or because they concerned private persons claiming adversely to the Indians. It has been the Government's contention throughout that these distinguishing features are of paramount importance to the correct disposition of this case, and that the United States should not be held liable

* Hereafter in this brief the term "Indian title," unless further qualified, will be used to signify the unrecognized original Indian title or right of occupancy as opposed to a recognized Indian title or right of occupancy. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

for the extinguishment or taking of Indian title unless such title had been recognized or confirmed by Congress or by the sovereign from which the United States had acquired its interest in the lands.' We submit that the failure of the Court of Claims to accept the Government's contention was due to a misconception of the force of the jurisdictional Act and a misinterpretation of the effect of prior judicial decisions dealing with the question of Indian title in general.

A. *The jurisdictional Act did not create the liability.*—In arriving at its decision that respondents were entitled to recover, the Court of Claims first assumed that the jurisdictional Act under which this suit was filed (*supra*, pp. 2–3) authorized the entry of judgment for compensation merely upon the establishment of a claim of Indian title by occupancy from time immemorial (R. 21). However, it is well settled that a special jurisdictional Act does not admit any legal liabil-

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[1] In their brief in opposition to the petition for certiorari (p. 7) respondents imply that the United States in this case has taken a position inconsistent with that taken in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. But the contention now made, namely, that the United States may extinguish unrecognized Indian title without liability, was clearly distinguished from the issue in that case, which was the enforceability of Indian title against private individuals. See Brief for the United States (prepared by attorneys of the Interior Department), pp. 15–17, 36, 40, 41; Reply Brief for the United States (prepared by attorneys of the Interior Department), pp. 4–5; and the Memorandum for the Government of the United States submitted by the Solicitor General.

ity on the part of the Government, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500; *Turner* v. *United States,* 248 U. S. 354, 358. "No cause of action can be vindicated thereunder unless such a cause of action as, apart from the impediment of governmental immunity from suit, was already in existence." *Shoshone Tribe* v. *United States,* 299 U. S. 476, 493. As Mr. Justice Holmes said of a similar jurisdictional Act in *The Sac and Fox Indians,* 220 U. S. 481, 489. "A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right." See also *United States* v. *Old Settlers,* 148 U. S. 427, 469.

The fact that the jurisdictional Act recites the nature of the alleged claim does not alter the rule. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498; *Stanton* v. *United States,* 68 C. Cls. 379; *Randall* v. *United States,* 71 C. Cls. 152; *The Oyster Cases,* 94 C. Cls. 397. As this Court said in *Kinkead* v. *United States,* 150 U. S. 483, 498:

> It needs no argument to show that there is a wide distinction between an act directing a particular thing to be done, and an act reciting the existence of a certain fact which had long been a matter of dispute, and which the Court of Claims was authorized by the act to pass upon and determine.

In the legislative history of the present Act there is nothing to indicate that Congress intended to give to the Indians any new right other than the right to have their claims adjudicated in accordance with then existing legal principles.* See S. Rep. No. 795 and H. Rep. No. 1085, 74th Cong., 1st sess. The legislative history merely recites that "the Indians are of the belief that their claims are valid (*ibid.*)," and clearly shows that the purpose of the Act was to provide a forum for a judicial determination of the validity of such claims. Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms are forbidden. *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373. In the latter case this Court said (p. 375):

> The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obliga-

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* When Congress has intended to extend the liability of the United States, it has done so in no uncertain manner. For example, in giving the California Indians a right to sue in the Court of Claims, Congress provided (Act of May 18, 1928, 45 Stat. 602):

"It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief."

See *The Indians of California* v. *United States,* 98 C. Cls. 583, certiorari denied, 319 U. S. 764.

> tion we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. * * *

It follows, therefore, that unless the Government was under an already existing liability to make compensation for the taking of lands held by unrecognized Indian title, there can be no recovery here.

B. *There is no liability under either the Fifth Amendment or any other rule of law.*—The United States would be liable here only if its 1855 action amounted to a taking compensable under the Fifth Amendment or constituted an implied agreement to pay the tribes. However, its obligation upon taking Indian lands occupied under a temporary right of occupancy was understood at the time of the events here in question, and repeatedly characterized since, as a moral or political, not a legal, obligation. An Indian right of occupancy, whether or not formally recognized by the sovereign, has always been protected against the acts of private individuals, but "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And

whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. Thus, "since *Johnson* v. *M'Intosh*, 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss." *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

Despite these recent admonitions to the contrary, the Court of Claims reasoned that the liability of the United States for the taking of Indian lands was the same whether the lands were held by a recognized or unrecognized Indian title, that original Indian title could be constitutionally extinguished only by purchase, and that, upon the consent of the United States to be sued on claims arising out of original Indian title, respondents were entitled to recover for the extinguishment of such title when accomplished by a method other than purchase (R. 70–77). We submit that the court's reasoning ignores basic distinctions made in the decided cases[9] and is not

[9] For example, in its opinion the Court of Claims quoted at length (R. 73–74) from that part of this Court's opinion in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, where the protection of Indian title against private individ-

in accord with the historical development of the concept of Indian title.

Principles of international law have been deemed to require a sovereign to respect private rights in property when acquiring sovereignty by conquest or cession over territory occupied by another member of the family of nations. *Barker* v. *Harvey,* 181 U. S. 481, 486. On the other hand, as Chief Justices Marshall and Taney pointed out, all territory not in the possession of states who are members of the family of nations has been deemed open to occupation by the discovering nation, and title to such territory has vested in the occupying sovereign by virtue of the discovery. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 573; *Martin* v. *Waddell,* 16 Pet. 367, 409–410; Lawrence, Principles of International Law (7th ed., 1923) pp. 148–149; Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) pp. 106–107; Moore, *International Law Digest* (1906) pp. 258–259. Thus, when the European nations came to North America and found it inhabited by uncivilized Indians, it was unanimously agreed by the nations, in accordance with principles of international laws as understood by the then civilized powers of Europe, that each should have exclusive title by discovery to all territory reduced to possession. *Johnson* v. *M'In-*

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uals was discussed, but completely ignored the immediately following portion of the opinion (quoted above) where it was indicated that extinguishment of Indian title by the sovereign was a "different matter" (p. 347).

tosh, supra, pp. 572–592; *Martin* v. *Waddell, supra.* However, in order to placate the warlike and numerically superior Indian tribes and their own consciences, the Europeans treated their own exclusive title as subject to the temporary occupancy of the Indians. Until the Indian right of occupancy was extinguished, the sovereign granted the fee of the lands in the New World subject to the Indian right of occupancy, the colonists were forbidden to take possession of lands occupied by Indians without tribal consent, and the natives were permitted to use such lands according to their own discretion. *Fletcher* v. *Peck,* 6 Cranch 87, 141–142; *Johnson* v. *M'Intosh, supra,* pp. 572–584; *Martin* v. *Waddell, supra,* p. 409.

This temporary right of occupancy has come to be known as original Indian title. *Shoshone Indians* v. *United States,* 324 U. S. 335, 338–339; *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345. But, although this Indian title was considered to be as sacred as the fee insofar as interference by private individuals was concerned, nevertheless the European sovereigns, and later the United States, claimed the paramount right to extinguish the Indian right of occupancy at will, by treaty, purchase. the sword, or the exercise of complete dominion adverse to the right of occupancy. *Fletcher* v. *Peck,* 6 Cranch 87, 142; *Johnson* v. *M'Intosh,* 8 Wheat. 543, 587–592; *Clark* v. *Smith,* 13 Pet. 195, 201; *Martin* v.

Waddell, 16 Pet. 367, 409; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. at p. 347; *Shoshone Indians* v. *United States*, 324 U. S. at p. 339. In essence, the sovereign claimed full ownership of the lands occupied by the Indians and merely permitted as a matter of grace a continuance of the Indian occupancy until it was desired to put such lands to other uses. However unjust it may seem that the Indians were thus unwillingly or even unknowingly deprived of their rights in the soil, that is a political matter to be determined by Congress and not by the courts. *Johnson* v. *M'Intosh*, *supra*, pp. 572, 589–592; *Worcester* v. *Georgia*, 6 Pet. 515, 543. As stated by Lawrence, *Principles of International Law* (7th ed., 1923) p. 148, "The rights of the natives are moral, not legal."

Hence, it is plain that the rights under original Indian title are in all material respects no greater than the Indians' rights in reservations carved from the public domain by executive order, which rights can be terminated at any time without liability. *Sioux Tribe* v. *United States*, 316 U. S. 317. Just as in the case of an executive order reservation, it is the absence of a legal liability, rather than, as the court below thought (R. 71, 75), the Government's immunity from suit, which prevents recovery for the taking of original Indian title. It is clear, therefore, that when the United States extinguished respondents' original Indian

title, the Government was at the most under merely a moral obligation to make compensation therefor, so that there can be no basis for the legal liability necessary to support recovery under the present jurisdictional Act. In its dealings with Indian title, as Mr. Justice Holmes has stated, the United States "bound itself only by honor, not by law." *Conley* v. *Ballinger*, 216 U. S. 84, 90; see also *The Sac and Fox Indians*, 220 U. S. 481, 489; *United States* v. *Old Settlers*, 148 U. S. 427, 469; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; cf. *Cummings* v. *Deutsche Bank*, 300 U. S. 115.

The error in the Court of Claims' conclusion to the contrary arises, in part, from its failure to consider the important distinction between recognized and unrecognized Indian title. Of course, original Indian title is not the only basis for the Indian right of occupancy; the generic term "Indian title" has various shades of meaning. See Cohen, *Handbook of Federal Indian Law* (1942), pp. 291–305. From the beginning, the European sovereigns, in order to obtain protection against the Indians and each other, entered into treaties of alliance with the Indians and in some instances promised them a perpetual right to occupy defined areas free from interference by the whites. After indepeindence the United States followed the same policy of making treaties with various tribes, so that at a very early date most of the Indian lands

were held under a treaty-recognized right of occupancy. *Worcester* v. *Georgia,* 6 Pet. 515, 546–550; *Mitchel* v. *United States,* 9 Pet. 711, 745–756; *Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496. When by treaty or Act of Congress the United States has guaranteed to Indians the perpetual and exclusive right to occupy a defined area, the Indians have thereby acquired a vested property right in such lands which is protected by the Fifth Amendment and cannot be taken by the United States without the payment of just compensation. *Chippewa Indians* v. *United States,* 301 U. S. 358, 375–376; *United States* v. *Klamath Indians,* 304 U. S. 119; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *United States* v. *Creek Nation,* 295 U. S. 103, 109–110. This is so even though the United States has an unlimited power to manage and control the lands, and the Indians could not dispose of such lands to others without governmental consent (*ibid.*).

But merely because it has been the policy of the ruling sovereign to enlarge upon the Indian right of occupancy and create vested property rights it does not follow that the original Indian title is to be transformed into some greater right when the sovereign has not specifically done so. There is nothing inconsistent in the fact that some tribes at one time had merely a temporary right of occupancy and later a permanent right, or that some

tribes have never had anything but a temporary right subject to extinguishment at the will of the sovereign. The distinction has always been maintained. *Barker* v. *Harvey*, 181 U. S. 481, 491–492; *Shoshone Indians* v. *United States*, 324 U. S. 335, 338–339. A plain indication of the difference between recognized and unrecognized Indian title is given in *Barker* v. *Harvey*, 181 U. S. 481, where claimants under a patent from the United States in confirmation of Mexican grants prevailed over Mission Indians of California who claimed rights by virtue of aboriginal possession, for it was held that Mexico had never recognized the Indian title (p. 499). It was there stated (pp. 491–492):

> * * * it could not well be said that lands which were burdened [by Mexican recognition] with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.

Here is a clear statement of the paramount distinction between recognized and unrecognized In-

dian title which the Court of Claims ignored. Aboriginal possession creates against the United States only a temporary right of occupancy which can be terminated at will without liability. It is only when a permanent right of occupancy is guaranteed by treaty or Act of Congress that the Indians acquire property rights entitled to protection by the Fifth Amendment.

The Court of Claims considered (R. 71, 73) that the only effect of treaties which acknowledge and guarantee title to the Indians was that the Indians reserved their original title to certain of their lands while relinquishing all claim to other areas, so that their interest in the lands retained was no greater than prior to the treaty. This view attaches too much force to the original Indian title. The true effect of such treaties was that the Indians abandoned all rights from aboriginal possession to part of the lands claimed by them, while the sovereign gave up its unlimited right to extinguish the right of occupancy in the lands reserved by transforming the temporary right of occupancy into a permanent property right. Cf. *Barker* v. *Harvey*, 181 U. S. 481, 491–492. The fact that acknowledgment by Congress enlarges and makes permanent the temporary right of occupancy rather than creating a completely new title (*United States* v. *Klamath Indians*, 304 U. S. 119, *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94 (C. C. Ore.)) does not

mean that the unrecognized Indian title is a permanent property right.[10]

Because of the fact that in most instances the Indians hold their lands under recognized Indian title there is much language in the reported opinions which, if taken to apply to original Indian title as well, would support the view that the United States could not extinguish such title without incurring the liability of paying just compensation. But, when the distinctions between recognized and unrecognized title and between the actions of the United States and others are kept in mind, it becomes clear that these cases are not contrary to the Government's position here. For example, in many cases it has been stated that the Indian "right of occupancy is considered as sacred as the fee simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 746; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48; *United States* v. *Cook,* 19 Wall. 591, 593; *Leavenworth &c. R. R. Co.* v. *United States,* 92 U. S. 733, 755; *Beecher* v. *Wetherby,* 95 U. S. 517, 526. However, in none of these cases was there involved a controversy between Indians and the United States, and the Court was referring to the Indian rights against others than the Federal Government. Cf. *Lone*

[10] In many instances the Indians relinquished all claim to lands outside the treaty area, no attempt being made to describe particularly the area previously claimed. See Treaty with Sioux Tribe of 1868, Art. 2, 15 Stat. 635; Treaty with Poncas Indians of March 12, 1858, 12 Stat. 997; Treaty with the Sac and Fox Indians of 1842, 7 Stat. 596.

Wolf v. *Hitchcock*, 187 U. S. 553, 565. Moreover, in all the cases a treaty right of occupancy was involved. In cases where the controversy was between the United States and the Indians, the Court has been careful to indicate that it is the "pledged" or "perpetual" right of occupancy which is as sacred as the fee. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497. It is clear, therefore, that there is nothing in the decided cases indicating that the United States would be liable for destroying the original, unrecognized Indian title or right of occupancy. To the contrary, all the indications are the other way.

The fact that, as against others than the sovereign, original Indian title has been protected by the courts (*United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339) is not derogatory of the principle that the United States might extinguish such title at will. The protection afforded against private individuals is merely a corollary to the principle that none but the sovereign could disturb the Indians' occupancy. Cf. *Johnson* v. *M'Intosh*, 8 Wheat. 543, 573. Merely because the Indians had rights protected by the courts against actions of others than the United States, it does not follow that they had any enforceable rights against the United States.

The resulting situation is not unique in the application of public land laws. Stockmen had an implied license to graze their stock on the

public lands, such license being the basis of rights between individuals, but not as between the licensee and the United States. *Buford* v. *Houtz*, 133 U. S. 320; *Light* v. *United States*, 220 U. S. 523. Even when formally recognized by regulations and the granting of permits, the license could be withdrawn by the Government without payment of compensation. *Osborne* v. *United States*, 145 F. (2d) 892 (C. C. A. 9). Similarly, long before the public lands were thrown open to homesteading or purchase, settlers were allowed to take possession by implied license of the United States. They thereby acquired rights which were good against all the world except the United States. *Tarpey* v. *Madsen*, 178 U. S. 215, 221. They could sell their rights (*Lamb* v. *Davenport*, 85 U. S. 307), and could maintain actions in trespass and to recover possession. *Wamble* v. *Evants*, 23 Ariz. 307; *Taylor* v. *Woodward*, 10 Cal. 90; *Maydole* v. *Watson*, 7 Idaho 66. Congress recognized their status by giving them preference and preemption rights in the purchase or homesteading of the land when it was thrown open for private acquisition. *Tarpey* v. *Madsen*, 178 U. S. 215; *Frisbie* v. *Whitney*, 76 U. S. 187, 194. Nevertheless, the settlers acquired no vested rights against the United States or its grantees (*Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260; *Northern Pacific Railroad Co.* v. *Colburn*, 164 U. S. 383; *Frisbie* v. *Whitney*, 76 U. S. 187, 194), and they were not entitled to any compensation for the land or improvements upon their removal by

authorization of Congress. *Russian-American Co. v. United States,* 199 U. S. 570. We submit that the Indians by virtue of their original title had no greater right as against the United States in the lands occupied by them than did these stockmen or settlers.

The court below stated that with one qualified exception in the case of Indians in California, the United States has "consistently conceded and recognized that Indians had a beneficial possessory ownership in lands used and exclusively occupied by them" (R. 72, see also R. 73). The practice of Congress in recognizing its moral obligation to the Indians, does not, of course, establish the existence of an enforceable right absent such recognition. Moreover, it has not been the policy of the Government to recognize rights of the Indians to all of the territory claimed by them. On the contrary, in the many treaties upon the subject, the Indians were given rights to smaller, well defined areas and were obliged to relinquish their claims to the larger areas. For example, the unratified treaty of 1855 required relinquishment of respondents' claim to the land here involved and set aside the Siletz reservation for them (R. 8). Cf. *United States* v. *Klamath Indians,* 304 U. S. 119; see Cohen, *Handbook of Federal Indian Law* (1942), pp. 62–63, 65, and treaties there cited.

The opinion below relied upon *The Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, to support its conclusion (R. 77). But in that case

the question here was not reached because the plaintiff failed to prove title by immemorial possession (77 C. Cls. at p. 370). In the court below the United States relied upon *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755, and particularly on the following language of that opinion (p. 600):

> We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction * * *, and the issue is a political and not a judicial one.

The opinion below distinguished this case on the ground that the *Duwamish* jurisdictional Act did not authorize a suit based on aboriginal Indian title (R. 76). The Government believes the court below erred because the jurisdictional Act in the *Duwamish* case conferred on the Court of Claims jurisdiction to adjudicate "all claims of whatever nature, both legal and equitable" which certain named tribes "with whom no treaty has been made" might have (79 C. Cls. at p. 532). In any event, we submit that the language of the opinion above quoted indicates that recognition of the title by right of occupancy, by an Act of Congress or by a treaty was a necessary prerequisite to recovery.

If Congress has not seen fit to establish an obligation and specify the cases and contingencies in which the liability of the Government is submitted for judicial determination, the courts may not substitute their judgment for that of Congress, which has an absolute discretion over the liability of the United States to suit. *Schillinger* v. *United States,* 155 U. S. 163, 166.

II

RESPONDENTS' ORIGINAL INDIAN TITLE HAS NOT BEEN FORMALLY RECOGNIZED

As has been shown (*supra,* pp. 14–32), the United States is under no legal obligation to pay compensation for the extinguishment of original Indian title unless it has formally recognized such title. Merely a recognition of the principle that the Indians had some rights, especially against private individuals, flowing from their original Indian title is not sufficient to impose the liability. There must be a recognition or confirmation of a specific claim by an Indian tribe to rights of occupancy in a definite area, such recognition being by treaty or Act of Congress. Even the recognition by treaty must be such as to show an intention to do more than merely recognize the *status quo* by conceding that a tribe has original title or temporary right of occupancy in lands claimed. Cf. *Shoshone Indians* v. *United States,* 324 U. S. 335. Before an Indian tribe can become vested with any property rights as against

the United States, it must be shown that the United States has recognized the Indian title to the extent of guaranteeing undisturbed, exclusive and perpetual occupancy. Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

Although the Court of Claims made no finding that the United States had recognized respondents' original title,[11] it attempted to buttress its opinion by holding that in any event the Act of August 14, 1848 (*supra*, pp. 3–4) amounted to a recognition of Indian title (R. 74). The absence of a necessary finding may not be cured by statements in the opinion. *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206. Moreover, it is clear that Section 1, which the court below relied upon and which merely acknowledged the principle that the Indian right of occupancy under original title was subject to protection until ex-

[11] In their brief in opposition (pp. 2–3) respondents imply that recognition was found in Finding 20 (R. 50) which reads as follows:

"Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation."

The "finding" is in reality a conclusion of law, and even if it be considered a finding of fact, it does not in form purport to be a finding that the original Indian title had been recognized.

tinguished, does not constitute recognition. When read in its entirety, it is plain that Section 1 is nothing more than a declaration of the historic policy of protecting the Indian title against encroachment by settlers and other private interests, with a complete reservation of all the Government's rights, including the right to extinguish the Indian title without liability. Manifestly, the language used is not sufficient to support a finding of recognition of original Indian title. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335.

In any event, subsequent administrative and legislative action, which may be examined to aid interpretation, is conclusive that the 1848 Act had no such effect. Cf. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Brooks* v. *Dewar*, 313 U. S. 354, 361. It was not until after the passage of the Act of June 5, 1850, 9 Stat. 437, authorizing the negotiation of treaties with respondents and other tribes, that the United States appointed agents to ascertain what tribes occupied the area and what lands they claimed (Findings 2, 5; R. 24–25, 34). Obviously, it cannot be logically contended that two years earlier Congress had intended to recognize the Indian title to defined areas when Congress had not yet been officially informed of the existence of the tribes and what lands they claimed. As a matter of fact, apparently the Treaty of 1855 was not ratified because of conflicts between the claims of the various tribes in Oregon (Finding 2, R. 26). More-

over, the court's holding that the 1848 Act amounted to a recognition is obviously inconsistent with its finding (Finding 35, R. 58; see opinion, R. 82–83) that Congress had not recognized any tribal rights in the 1855 Siletz Reservation until 1894.[12] Surely, if the Act of March 3, 1875 (R. 51–52) was not a recognition by Congress of definite rights in the reservation, the 1848 Act cannot be said to be a recognition of Indian title in any specified area.[13]

The Court of Claims also relied upon an opinion of the Attorney General, 7 Op. A. G. 293, 299 (R. 75), and respondents may point to the words and acts of various government officials (see Brief

[12] As the court below correctly understood (R. 82–83), the Act of August 15, 1894 (Appendix, *infra*, pp. 38–44) dealt with the reservation as it existed at the time of the 1892 agreement (see Statement *supra*, p. 7) and did not constitute a recognition of Indian title to the lands involved here.

[13] It is the Government's position that inasmuch as the Act of March 3, 1875, 18 Stat. 420, 446, which authorized removal of the Indians from a portion of the lands which were thrown open to settlement, was conditioned upon consent of the Indians and they did consent to such removal (Finding 22, R. 51–52), no recovery may be had for a taking of such lands, even if aboriginal title constitutes a sufficient foundation for recovery. *Cf. United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 356–358. Since the judgment of the court below merely determines that the plaintiffs are entitled to recover and reserves for future proceedings the amount thereof (R. 84), this contention has not been further briefed at the present time, nor have questions concerning the proper treatment of the allowance to the United States for lands or the proceeds thereof, which the respondents have actually received (R. 82), nor similar questions as to the amount of the recovery.

in Opposition to Petition for Writ of Certiorari, pp. 13–18), as supplying the requisite recognition. As for the opinion of the Attorney General, it, like the 1848 Act, is merely a recognition of the principle that, until extingished, original Indian title is protected against interference by private individuals. Moreover, inasmuch as lands occupied by Indians under original title are for all practical purposes public lands of the United States (*supra*, pp. 19–23), and since Congress alone has the power to dispose of the Government's interests in the public lands (*Sioux Tribe* v. *United States*, 316 U. S. 317, 326), it is difficult to see how the Attorney General or any other public official could release the Government's right thereto without authorization so to do from Congress. Such authorization is entirely lacking here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and with directions to dismiss the petition.

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Solicitor General.

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Acting Head, Lands Division.

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Attorneys.

DECEMBER 1945.

APPENDIX

1. Section 15 of the Act of August 15, 1894, 28 Stat. 286, 323, provides:

> Whereas Reuben P. Boise, William H. Odell, and H. H. Harding, duly appointed commissioners on the part of the United States, did, on the thirty-first day of October, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Alsea and other bands of Indians residing upon the Siletz Reservation in the State of Oregon, which said agreement is as follows:
>
> This agreement made and entered into in pursuance of the provisions of the Act of Congress approved July thirteen, eighteen hundred and nine-two, at the Siletz Agency, Oregon, by Reuben Boise, William H. Odell, and H. H. Harding, on the part of the United States, and the chiefs, headmen, and male adults of the Alsea and other bands of Indians located on said Siletz Reservation, witnesseth:
>
> ARTICLE I
>
> The Indians located on said Siletz Reservation hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, except the five sections described in Article IV of this agreement.

ARTICLE II

In consideration of the lands sold, ceded, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Indians located on said Siletz Reservation the sum of one hundred and forty-two thousand and six hundred dollars ($142,600), in payments as follows, to wit:

One hundred thousand dollars ($100,000) shall be deposited in the Treasury of the United States to the credit of the Indians of the Siletz Reservation, in the State of Oregon, which shall bear interest at the rate of five (5) per cent per annum, to be paid annually at the agency on said reservation on the first day of March of each and every year. The balance of said principal sum shall be paid as follows, to wit:

Within three months after the approval of this agreement by Congress there shall be paid to each Indian on said reservation, who shall be of age, to wit: Males of twenty-one years, and females of eighteen years or more, and all married persons, whether they shall be of age or not, the sum of seventy-five dollars ($75) each, and annually thereafter on each interest-paying day, there shall be paid a like sum of seventy-five dollars ($75) to each one who shall have become of age as aforesaid, or who shall have married, whether of age or not (who shall not have been paid seventy-five dollars) during the preceding year, the said sum of seventy-five dollars; and all of the money so held back by the United States to pay said delayed payments shall also draw interest at the rate of five per cent per annum; and the parents of all infants who are

supporting the same shall receive annually all the interest money according to the share pro rata of each infant: *Provided, however,* That in case of all aged or infirm persons, who are incapable of taking care of themselves, the same due and payable to such may be used for the support and care of such persons, in such manner as the Secretary of the Interior may from time to time direct: *And provided further,* That this agreement shall apply only to persons who shall be living and belonging on said reservation at the time of the ratification of the same by Congress.

ARTICLE III

It is hereby further stipulated and agreed that as soon as the lands which have been allotted to the Indians on said Siletz Indian Reservation shall become subject and liable to taxation by the State of Oregon, then the Secretary of the Interior may reserve a part of said interest money, so coming to said Indians, not exceeding one-third thereof for each year, and pay the same to the State and local authorities of the State of Oregon, in lieu of taxation upon the lands allotted to said Indians, under such rules and regulations as he may prescribe or as may be prescribed by law, to secure to the Indians the full enjoyment of the protection of the laws of said State, and a just share of all benefits derived from said payment in lieu of taxes: *Provided,* That all road taxes, which by the laws of the State may be discharged by work, may be so discharged by the Indian owners of said allotted lands on the roads in their respective vicinities: *And provided further,* That Congress may from time to time ap-

propriate and provide to pay any part of said principal sum, so as aforesaid held in trust, as the condition and interests of said Indians may seem to require or justify; *And provided further,* In case said Indians or any portion thereof may desire to be furnished with supplies instead of cash payments of interest or principal, then the Secretary of the Interior may issue such supplies at cost price in such reservation, at the agency therein, in lieu of cash payments of interest, or any part of the principal sum, which may be from time to time appropriated by Congress: *And provided further,* That in case the Secretary of the Interior may at any time be satisfied that any of said Indians are fully competent and capable of managing and taking care of their full pro rata of said purchase money, and that it will be to their interests to receive the same, and that other portions of said Indians are not so capable and competent, then he shall recommend to Congress that sufficient amount of such principal sum so held in trust as provided in section 2 of this agreement shall be appropriated to pay the full pro rata of such competent and capable Indians of such principal fund, and when the same shall have been paid and receipted for personally by each Indian so paid, then such Indians shall have no further interest in said trust fund.

ARTICLE IV

It is further stipulated and agreed that section nine (9) in Township nine (9) south, range 11 west of the Willamette meridian, and the west half of the west half of section five (5), and the east half (½) of section six (6) and the east half of the

west half of section 6, township 10 south, range 10 west, W. M., and the south half of section 8 and the north half of section 17, and section sixteen (16) in township 9 south, range 9, west of the Willamette meridian, and the east half of the northeast ¼, and lot 3, sec. 20, and S. ½ and S. ½ of north half of sec. 21, town 8, range 10 west, W. M., are hereby reserved from sale, and that the timber on said five sections of land may be cut and manufactured by the Indians of said Siletz Reservation for their own use and for sale, under such rules as the Secretary of the Interior shall from time to time prescribe, regulating the cutting of timber, so as to secure an equality of benefits to the Indians, employment for them, and judicious aid to them in becoming self-supporting.

ARTICLE V

It is further agreed that no part of said sum of money so agreed as aforesaid shall ever be applied to the payment of any claim against any of the Indians alleged to have occurred prior to the ratification of this agreement by Congress.

ARTICLE VI

It is further stipulated and agreed that any religious society or other organization not occupying under proper authority, for religious or educational work among the Indians, any of the lands in this agreement ceded, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at the rate of $2.50 per acre, the same to be conveyed to such society or organization by patent.

ARTICLE VII

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Reuben P. Boise, William H. Odell, and H. H. Harding, on the part of the United States, and the chiefs, headmen, and other male adults of the Indians residing on said Siletz Reservation, have hereunto set their hands and affixed their seals.

Done at the Siletz Agency, Oregon, this the 31st day of October, A. D. 1892.

REUBEN P. BOISE, [L. S.]
WILLIAM ODELL, [L. S.]
H. H. HARDING, [L. S.]
United States Commissioners.

Committee appointed at general council of Indians, October 29, 1892:

SCOTT LANE [L. S.]; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and forty-two thousand six hundred dollars, which sum of money shall be paid to the Indians in the manner and form prescribed by articles two and three of the agreement: *Provided,* That none of the money or interest thereon which is by the terms of said agreement to be paid to said Indians shall be applied to the payment of any judgment that has been

or may hereafter be rendered under the provisions of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to provide for the adjudication and payment of claims arising from Indian depredations." The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

That all of the money so held by the United States to pay the delayed payments shall draw interest at the rate of five per centum per annum after the passage of this Act.

That immediately after the passage of this Act the Secretary of the Interior shall under such regulations as he may prescribe, open said lands to settlement after proclamation by the President and sixty days' notice.

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OCT 7 1946

No. 26

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INDEX

	Page
Statement	1
Argument: The jurisdictional act did not create a liability	1
Conclusion	13
Appendix	15

CITATIONS

Cases:

Bakelite Corp'n, Ex parte, 279 U. S. 553	3
Blankfeather v. *United States*, 190 U. S. 368	3
Bodkin v. *United States*, 67 C. Cls. 281, certiorari denied, 280 U. S. 572	6
Bonner v. *United States*, 9 Wall. 156	9
Boston Sand Co. v. *United States*, 278 U. S. 41	4
Choctaw Nation v. *United States*, 119 U. S. 1	5
Choctaw & Chickasaw Nations v. *United States*, 88 C. Cls. 271	2, 6
Creech v. *United States*, 102 C. Cls. 301, certiorari denied, 325 U. S. 870	4
Delaware Tribe v. *United States*, 72 C. Cls. 483; 74 C. Cls. 368	5
Duwamish, et al. Indians v. *United States*, 79 C. Cls. 530	12
Eastern Transp. Co. v. *United States*, 272 U. S. 675	3
Garrett v. *United States*, 70 C. Cls. 304	5, 6
Harvey v. *United States*, 105 U. S. 671	9
Haskell v. *United States*, 9 C. Cls. 410	9
Indians of California, The v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764	5, 6, 8
Intermingled Cotton Cases, 92 U. S. 651	6
Kawananakoa v. *Polyblank*, 205 U. S. 349	2
Klamath Indians v. *United States*, 296 U. S. 244	3, 4, 5, 7, 8
Menominee Tribe of Indians, The v. *United States*, 101 C. Cls. 10	5
Oakes v. *United States*, 174 U. S. 778	4
Osage Tribe of Indians, The v. *United States*, 102 C. Cls. 545	6
Oyster Cases, The, 94 C. Cls. 397	4
Pawnee Indians v. *United States*, 56 C. Cls. 1	6
Pine Hill Co. v. *United States*, 259 U. S. 191	4
Pocono Pines Hotels Co. v. *United States*, 73 C. Cls. 447	2, 3
Pope v. *United States*, 323 U. S. 1	5, 8
Price v. *United States and Osage Indians*, 174 U. S. 373	3
Randall v. *United States*, 71 C. Cls. 152, certiorari denied 283 U. S. 826	4
Sac and Fox Indians, The, 220 U. S. 481	4, 8

Cases—Continued	Page
Seminole Nation v. *United States*, 316 U. S. 286	9
Shoshone Tribe v. *United States*, 299 U. S. 476	4
Sioux Indians v. *United States*, 277 U. S. 424	4
Sioux Tribe of Indians v. *United States*, 97 C. Cls. 613, certiorari denied 318 U. S. 789	3
Sisseton and Wahpeton Indians v. *United States*, 39 C. Cls. 172; 42 C. Cls. 416	6
Stanton v. *United States*, 68 C. Cls. 379	4, 6
Thompson v. *United States*, 246 U. S. 547	5
Thurston v. *United States*, 232 U. S. 469	3
Tillson v. *United States*, 100 U. S. 43	3, 8
Turner v. *United States*, 248 U. S. 354	4
United States v. *Cumming*, 120 U. S. 452	9
United States v. *Durrance*, 101 F. 2d 109	4
United States v. *Gillis*, 95 U. S. 407	9
United States v. *Goltra*, 312 U. S. 203	3, 5
United States v. *Klamath Indians*, 304 U. S. 119	5, 7
United States v. *Mille Lac Chippewas*, 229 U. S. 498	4
United States v. *Milliken Imprinting Co.*, 202 U. S. 168	9
United States v. *Old Settlers*, 148 U. S. 427	4, 9
United States v. *Sherwood*, 312 U. S. 584	3
Williams v. *United States*, 289 U. S. 553	3
Yankton Sioux v. *United States*, 53 C. Cls. 67	6
Statutes:	
Act of August 26, 1935, 49 Stat. 801, Secs. 1 and 2	15
Civil War Abandoned Property Act of March 3, 1863, 12 Stat. 820	6
Indians Claims Commission Act (Pub. No. 726, 79th Cong. 2d sess.)	10
Judicial Code, sec. 151, 28 U. S. C. sec. 257	6, 8
Tucker Act of March 3, 1887:	
Sec. 1, 24 Stat. 505, 28 U. S. C. sec. 250	2
Sec. 14, as amended, 28 U. S. C. sec. 257	2
Miscellaneous:	
Cohen, *Handbook of Federal Indian Law* (1942), p. 374, footnotes 102, 103, 106, 107 and 109	8
92 Cong. Rec.:	
pp. 9086, 9343, 9545, 9623	12
pp. 8117–8118	11
H. R. 2678, 79th Cong. 2d sess.	10
H. R. 6983, 79th Cong. 2d sess.	10
H. Rep. No. 1085, 74th Cong. 1st sess.	7
H. Rep. No. 2050, 79th Cong. 2d sess.	11
S. 2428, 79th Cong. 2d sess.	12
S. Rep. No. 795, 74th Cong. 1st sess.	7
S. Rep. No. 1714, 79th Cong. 2d sess.	12
S. Rep. No. 1715, 79th Cong. 2d sess.	12

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STATEMENT

Oral argument in this case was concluded on February 1, 1946. On April 1, 1946, an order was entered whereby the case was restored to the docket for reargument before a full bench. In this brief the Government will supplement its discussion of the scope and effect of the special jurisdictional Act as contained in its original brief at pages 16–19.

ARGUMENT

THE JURISDICTIONAL ACT DID NOT CREATE A LIABILITY

It is axiomatic that the United States, just as any other sovereign, can not be sued without

its consent.[1] Thus, for sixty-five years following the adoption of the Constitution, in the absence of any consent to sue the Government, Congress itself, with some assistance from the executive departments, attempted to examine and determine all claims against the United States as an incident of its power to pay the debts of the Nation. As the number of claims multiplied and this practice became more burdensome to Congress and the executive departments, Congress in 1855 established the Court of Claims and delegated to it the examination and determination of all claims within certain classes. The court's authority was gradually expanded until its present basic jurisdiction to render money judgments[2] against the United States was crystalized by Section 1 of the Tucker Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. sec. 250, such jurisdiction being complemented by a great variety of

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[1] Mr. Justice Holmes supported the doctrine of sovereign immunity "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.

[2] In addition to the jurisdiction to render money judgments, the Court of Claims also has jurisdiction to issue advisory opinions in cases referred to it by either House of Congress pursuant to Section 14 of the Tucker Act, as amended, 28 U. S. C., sec. 257. See *Pocono Pines Hotels Co.* v. *United States*, 73 C. Cls. 447, 487–492; *Choctaw & Chickasaw Nations* v. *United States*, 88 C. Cls. 271.

special jurisdictional Acts.[3] However, "the Court of Claims has no general jurisdiction over claims against the United States and can take cognizance only of those which by the terms of some act of Congress are committed to it." *Thurston* v. *United States,* 232 U. S. 469, 476. Hence, as a corollary to the principle of sovereign immunity from suit, it has become well settled that, when Congress permits suit against the Government, the jurisdictional Act must be strictly construed, and that any implications as to jurisdiction under its terms are forbidden. *United States* v. *Goltra,* 312 U. S. 203, 210–211; *United States* v. *Sherwood,* 312 U. S. 584; *Klamath Indians* v. *United States,* 296 U. S. 244, 250; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373, 375–376; *Tillson* v. *United States,* 100 U. S. 43, 46; *Sioux Tribe of Indians* v. *United States,* 97 C. Cls. 613, 663–666, 682, certiorari denied, 318 U. S. 789.

In view of the above, it naturally follows that, absent a plain indication by Congress to the contrary, the jurisdictional Act involved in the instant case, Appendix, *infra,* p. 15, does not

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[3] For discussions of the development and nature of the jurisdiction of the Court of Claims, see *Williams* v. *United States,* 289 U. S. 553, 562–581; *Ex parte Bakelite Corp'n,* 279 U. S. 438, 452–455; *Pocono Pines Hotels Co.* v. *United States,* 73 C. Cls. 447, 466–502.

admit or create any legal liability on the part of the Government, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500. In other words, the special Act removes the impediment of sovereign immunity from suit, but otherwise leaves the parties in the same legal position as before. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 493; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46–47; *Sioux Indians* v. *United States*, 277 U. S. 424, 436; *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196; *Turner* v. *United States*, 248 U. S. 354, 358; *Oakes* v. *United States*, 174 U. S. 778, 785; *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Durrance*, 101 F. 2d 109, 110 (C. C. A. 5); *Creech* v. *United States*, 102 C. Cls. 301, 323, certiorari denied, 325 U. S. 870; *The Oyster Cases*, 94 C. Cls. 397, 413–414; *Randall* v. *United States*, 71 C. Cls. 152, 156, certiorari denied, 283 U. S. 826; *Stanton* v. *United States*, 68 C. Cls. 379, 389–390. As Mr. Justice Holmes said of a similar jurisdictional Act in *The Sac and Fox Indians*, 220 U. S. 481, 489, "A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right." See also *Klamath Indians* v. *United States*, 296 U. S. 244, 255; *United States* v. *Old Settlers*, 148 U. S. 427, 469.

It is true that Congress may and often does create a legal liability where none existed against the Government or transform a moral obligation into an actionable wrong, but when it does so such an intention is clearly manifested by the language of the special jurisdictional Act and the circumstances under which it was enacted. Cf. *Pope* v. *United States*, 323 U. S. 1; *United States* v. *Goltra*, 312 U. S. 203; *United States* v. *Klamath Indians*, 304 U. S. 119; *Klamath Indians* v. *United States*, 296 U. S. 244, 250–251; *Thompson* v. *United States*, 246 U. S. 547, 551; *The Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 10, 19; *The Indians of California* v. *United States*, 98 C. Cls. 583, 599, certiorari denied, 319 U. S. 764; *Garrett* v. *United States*, 70 C. Cls. 304. Moreover, it has been the practice of Congress to create liability on the part of the Government only when there had been a prior judicial determination adverse to the claimant or when the amount of the liability was liquidated or so readily ascertainable that Congress clearly knew the extent of the newly incurred obligation.[4] Otherwise, rather than sub-

[4] For example, in the *Pope*, *Goltra*, and second *Klamath* cases there had been prior determinations that the United States was not liable on the claims for which consent to be sued had been granted. See also *Choctaw Nation* v. *United States*, 119 U. S. 1, 29–30; *Delaware Tribe* v. *United States*, 72 C. Cls. 483; *id.* 525; 75 C. Cls. 368. Absent a prior determination, Congress has in the jurisdictional acts limited the amount of recovery. Thus in the *Pope* case Congress "in ef-

jecting the Government to a liability uncertain both in law and in amount, Congress has customarily referred claims resting on moral obligations or involving amounts of money as to which there was serious dispute to the Court of Claims for advisory opinions pursuant to Section 151 of the Judicial Code (28 U. S. C., sec. 257). Cf. *The Osage Tribe of Indians* v. *United States*, 102 C. Cls. 545; *Choctaw & Chickasaw Nations* v. *United States*, 88 C. Cls. 271; *Pawnee Indians* v. *United States*, 56 C. Cls. 1; *Yankton Sioux* v. *United States*, 53 C. Cls. 67; *Sisseton and Wahpeton Indians* v. *United States*, 39 C. Cls. 172; *id.* 42 C. Cls. 416. This practice of referring claims for advisory opinions is another reason for strictly construing special Acts against the admission or creation of liability. Cf. *Stanton* v. *United States*, 68 C. Cls. 379, 390; *Bodkin* v. *United States*, 67 C. Cls. 281, certiorari denied, 280 U. S. 572.

The present jurisdictional Act (Appendix, *infra*, p. 15) and the circumstances under which it was enacted present none of the indicia of a

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fect consented to judgment in an amount to be ascertained by reference to the specified data" (323 U. S. at p. 11), while in the *California Indians* case the amount of recovery was almost definitely defined in the jurisdictional Act (98 C. Cls. at p. 599). In the jurisdictional Act involved in the *Garrett* case the total liability of the Government was specifically delimited (70 C. Cls. at p. 312), and a similar procedure was followed in the Civil War Abandoned Property Act of March 3, 1863 (12 Stat. 820). See *Intermingled Cotton Cases*, 92 U. S. 651.

congressional intention to create a new liability. The Act itself clearly waives only the Government's immunity from suit and the statute of limitations, and can no more be considered to admit liability than any of the countless statutes as to which the same contention has been rejected. The legislative history (S. Rep. 795 and H. Rep. No. 1085, 74th Cong., 1st sess.) shows only that respondent Indians believed they had valid legal claims for the takings of their lands and desired a judicial determination thereof. If, as respondents, alleged, their claims were valid and lacked only consent for suit to effect their realization, there was no necessity for Congress even to consider the possibility of subjecting the Government to any new type of liability. It is plain, therefore, that without determing the merits of the claims or the moral obligation of the sovereign, Congress merely sent the case to the Court of Claims for decision on the alleged legal claim, leaving the way open for more thorough examination later in the event the claims were rejected as a matter of law. Cf. *Klamath Indians* v. *United States*, 296 U. S. 244, 255; *United States* v. *Klamath Indians*, 304 U. S. 119. Moreover, even while the bill was pending in Congress some of respondent bands had not yet formulated their claims, so that it was not possible to estimate accurately the total amount alleged to be due. S. Rep. No. 795 and H. Rep.

No. 1085, 74th Cong., 1st sess. In view of the practice to refrain from recognizing moral obligations without having definite knowledge as to the extent of the new liability and placing a limitation on the amount of recovery (*Pope* v. *United States*, 323 U. S. 1; *The Indians of California* v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764), if Congress were contemplating payment regardless of legal liability, it would have either made that intention clear as it has done in other cases,[5] or else referred the case to the Court of Claims for an advisory opinion under Section 151 of the Judicial Code.

The fact that the jurisdictional Act (Appendix, *infra*, p. 15) authorized the Court of Claims to adjudicate all "legal and equitable claims" does not militate against the strict construction contended for by the Government. The phrases "legal and equitable claims", "as justice and equity shall require", and similar phrases are found in practically all special jurisdictional Acts (see lists in Cohen, *Handbook of Federal Indian Law* (1942), p. 374, footnotes 102, 103, 106, 107 and 109), but these phrases are restricted in meaning and in no sense does the term "equitable" connote "moral". *Klamath Indians* v. *United States*, 296 U. S. 244, 250, 253; *The Sac and Fox Indians*, 220 U. S. 481, 489; cf. *Tillson* v. *United States*, 100 U. S. 43, 46.

[5] See cases cited *supra*, p. 5.

The reason for their presence is found in the history of the development of the jurisdiction of the Court of Claims. In the beginning the court had no equity jurisdiction, but was restricted in its jurisdiction to those causes cognizable in a court of law. *Bonner* v. *United States,* 9 Wall. 156, 159; *United States* v. *Gillis,* 95 U. S. 407, 412. Equity jurisdiction could be exercised only pursuant to a special Act. *United States* v. *Milliken Imprinting Co.,* 202 U. S. 168, 173–174; *Harvey* v. *United States,* 105 U. S. 671, 690. Hence, it is clear that the only purpose of the word "equitable" is to confer upon the Court of Claims the jurisdiction of a court of equity as well as a law court and to insure that claims cognizable in equity could be considered. *United States* v. *Old Settlers,* 148 U. S. 427, 469; cf. *Seminole Nation* v. *United States,* 316 U. S. 286, 295–296.

It is not a valid objection to the strict construction of the special Act that, if it is held as a matter of law that there is no liability for the taking of original Indian title, Congress would have sent respondents on a vain quest for relief. See *United States* v. *Cumming,* 130 U. S. 452, 455; *Haskell* v. *United States,* 9 C. Cls. 410, 414. Under this Act, respondents would have been entitled to recover if they proved recognition of their title by the United States (see the Government's main brief, pp. 33–37). Moreover, it is not unusual that suits against private litigants

are dismissed for failure to state a cause of action, and Congress plainly did not intend to place the United States in a more disadvantageous position than private defendants. Congress did not purport to be deciding the merits of respondents' claims, but merely supplied the judicial forum requested by the claimants. Since at the time the jurisdictional Act was passed there had been no square holding by this Court on the legal question whether there is liability for the taking of original Indian title, it was only appropriate that the legislative body consent to judicial determination of the question before considering whether respondents should be compensated regardless of liability in law.

The brief of the *amici curiae* refers (pp. 14–15) to the President's statement, issued at the time the Indian Claims Commission Act (Pub. No. 726, 79th Cong., 2d sess.)* was signed, as "the most recent official recognition of the traditional policy of this country, contrary to the contention of appellant, that Indian title is a property right". But the absence of such alleged policy clearly appears from consideration of a bill relating to the Salish and Kootenai Tribes of Indians at the same session of Congress. The Bill (H. R. 2678,

---

* This Act established a special commission to pass upon various claims of Indian Tribes. Its construction is not, of course, presented in the instant case. Section 11 of the Act provides that any suit pending in the Supreme Court shall not be transferred to the commission.

79th Cong., 2d sess.) referred to lands "formerly belonging to or possessed by said Indians". In reporting his views on the bill, the Attorney General stated "The use of the words 'or possessed by' would seem to be inappropriate, since it might be contended that these words permit the assertion of claims for lands which the Indians may claim to have held by possessory occupancy, but which may never have been held by those Indians under a recognized Indian title" (H. Rep. No. 2050, 79th Cong., 2d sess., p. 5). However, the bill was passed by both houses, and was submitted to the President for signature. On June 28, 1946, the bill was vetoed, the President's message stating in part (92 Cong. Rec., pp. 8117–8118):

> In addition to other objectionable features of the bill, an attempt is made in its provisions to define the "grounds for equitable relief" and the basis upon which the court shall render judgment in favor of the Indians and award them just compensation "as for a taking under the power of eminent domain". It is possible that under the provisions of the bill the use by the United States of any lands "formerly * * * possessed" by the Indians even though the Indians were without any recognized title would constitute a sufficient basis "for equitable relief" and "for a taking under the power of eminent domain". Thus the bill does not merely waive the statute of limitations and laches, and provide a forum for the adjudication

> of any preexisting claims which the Indians may have against the United States, but it seeks to create liability against the Government which would not otherwise exist. Moreover, by providing for the payment of just compensation, the bill would probably require the Government to pay interest, for a period of more than 30 years, on a claim that did not even exist prior to its passage. Neither on legal nor moral grounds would there seem to be any justification for legislation of this kind.

Thereafter two new bills were introduced (S. 2428, H. R. 6983, 79th Cong., 2d sess.) and one of these was passed, the Senate Committee reporting that "The bill in its present form eliminates the features of H. R. 2678 which were objected to by the President in his veto message". (S. Rep. No. 1714, 79th Cong., 2d sess.; see 92 Cong. Rec. pp. 9086, 9343, 9545, 9623). The Committee made this report to the Senate on the same day that it reported the Indians Claims Commission Act (S. Rep. No. 1715, 79th Cong., 2d sess.; see 92 Cong. Rec. p. 9086).

Nor is this the first occasion upon which a bill which contained language which might have authorized recovery upon an unrecognized Indian title was vetoed. In *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, the court quoted (p. 599) a veto message of President Franklin D.

Roosevelt of a special jurisdictional Act; the message stated in part:

> Recognition of Indian title is a purely political matter and can be accorded solely by the sovereign. Section 4 of this act might fasten upon the United States liability for the payment of the value of land which they had never recognized as belonging to these particular Indians solely because some official of the United States, minor or otherwise, had "recognized" title and occupancy by long possession as being in these particular Indians.

These actions represent additional instances of recognition of the fact that the Government's obligation upon taking Indian lands occupied under a temporary right of occupancy is a moral or political obligation, not a legal one (the Government's main brief, pp. 19–33) and confirm the view that the jurisdictional Act was not intended to be an assumption of liability for such a moral obligation.

CONCLUSION

Inasmuch as the jurisdictional Act does not admit or create a liability, respondents can recover only if in law the United States must make compensation for the taking of unrecognized Indian title, or if in fact respondents' title has been formally recognized. As has been shown in the Government's main brief, the taking of unrecognized Indian title does not impose any govern-

mental liability and respondents' title has not been recognized. It is, therefore, respectfully submitted that the judgment of the Court of Claims should be reversed and with directions to dismiss the petition.

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OCTOBER 1946.

APPENDIX

The pertinent portions of the jurdisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (b) [in] any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.
>
> SEC. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 26

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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INDEX

	Page
Opinion below	1
Questions presented	1
Statute involved	2
Statement	2
Reasons for denying the writ	3
The taking was inconsistent with Indian title and did not grow out of Government's naked fee	3
Legislative and executive construction	8
The jurisdictional act	9
Recognition	13
Conclusion	18
Appendix	19

CITATIONS

CASES:

Assiniboine Indian Tribe v. *U. S.*, 77 C. Cls. 347	10, 12
Beecher v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440	4
Buttz v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330	3
Chouteau v. *Molony*, 16 How. (U. S.), 203, 14 L. Ed. 905	3
Coos Bay Indian Tribe et al. v. *U. S.*, 87 C. Cl. 143	7, 9, 10, 12
Cramer v. *U. S.*, 261 U. S. 219, 67 L. Ed. 622	4
Crow Nation or Tribe v. *U. S.*, 81 C. Cls. 238, 269 U. S. 281	12, 13
Donnelly v. *U. S.*, 228 U. S. 243, 258, 57 L. Ed. 820, 826	18
Duwamish et al. Indians v. *U. S.*, 79 C. Cls. 530	7, 11, 12
Hayt v. *U. S.*, 38 C. Cls. 455	7
Holden v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523	3
Johnson v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681	3
Leavenworth, L. & G. R. Co. v. *U. S.*, 92 U. S. 733, 23 L. Ed. 634	4

Page

Minnesota v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954 4, 6
Mitchell v. *U. S.*, 9 Pet. (U. S.) 711, 9 L. Ed. 283 3
Northwestern Bands of Shoshone Indians v. *U. S.*, 95 C. Cls. 642, 324 U. S. — 13
Shoshone Tribe v. *U. S.*, 299 U. S. 476 4
Shoshone Tribe v. *U. S.*, 82 C. Cls. 23, 299 U. S. 476 12
Spalding v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469 4
U. S. v. *Candelaria*, 271 U. S. 432 7
U. S. v. *Chavez*, 290 U. S. 357 8
U. S. v. *Joseph*, 94 U. S. 614 7
U. S. v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219 3, 6
U. S. v. *Santa Fe Pac. Railroad*, 314 U. S. 339, 86 L. Ed. 260 3, 7, 8, 12
U. S. v. *Shoshone Tribe*, 304 U. S. 111, 82 L. Ed. 1213 3
Ute Indians v. *U. S.*, 45 C. Cls. 440 8
Wichita Indians et al. v. *U. S.*, 89 C. Cls. 378 9, 10, 11, 13
Worcester v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. Ed. 483 3

Statutes:

Special Jurisdictional Act of August 26, 1935 (49 Stat. 801) 19
Act of February 13, 1925, as amended May 22, 1939 (28 U. S. C. Sec. 288 (b)) 3
Act of July 27, 1868 (15 Stat. 218) 15
Act of July 31, 1854 13, 14

Miscellaneous:

Senate Rep. No. 795, 74 Cong., 1st Sess. 9
House Rep. No. 1085, 74 Cong., 1st Sess. 9
Senate Document No. 25, 53rd Cong., 1st Sess. 13, 14, 15
Annual Report of Commissioner of Indian Affairs, 1862 16
Ibid., 1863 15, 16
Ibid., 1864 16, 17
Ibid., 1867 17
Ibid., 1871 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Opinion Below

The opinion of the Court of Claims (R. 21-83) is not yet officially reported.

Questions Presented

The questions presented (Pet. p. 2) are not, we believe, stated with the precision required by the findings of the court below.

We take the liberty of restating such questions as follows:

1. Whether respondents can recover on proof of taking of lands held by original Indian title where the Jurisdictional Act specifically authorizes suit on "any and all legal and equitable claims arising under or growing out of the original Indian title."

2. Whether respondents can recover under such a jurisdictional Act upon such proof where the original Indian title was also recognized by the United States (finding 20, R. 50) but was not expressly conceded through a ratified treaty.

Statute Involved

The special Jurisdictional Act is set forth in full text in the Appendix, *infra*, pp. 19-21.

Statement

The statement made by Petitioner is substantially accurate, except there is no reference in the statement to Finding 20. The statement does show the taking for public use without compensation of Respondents' lands held by Indian title based on immemorial possession.

Practically every finding is given in substance in Petitioner's statement with the exception of Finding 20. This finding reads as follows:

> "Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation" (R. 50).

Although the making of this finding of recognition is not assigned as error or given as a reason for granting the writ, the Petitioner nevertheless seeks to have the general question of "formal recognition" reviewed by this Court.

The evidence not having been brought up, nor the motion for a new trial, this honorable Court will not review "errors assigned to the effect that there is a lack of substantial evidence to sustain the finding of facts." Section 3(b) of the Act of Feb. 13, 1925 as amended by the Act of May 22, 1939, 28 U. S. C. (Sec. 288(b)).

Reasons for Denying the Writ

The Taking of the Indians' Lands Was An Act Inconsistent with the Indian Title and Did Not Grow Out of the Government's Title of Naked Fee.

No new question is here presented.

The salient points have all been many times decided. The complete title to Indian tribal lands, whether held under aboriginal title or by reservation, are concurrently shared by the Indian tribe and the United States Government. The Indian part in such title is a right of perpetual occupancy as sacred as the fee simple. The United States part in such title is the naked fee.

For more than a century this court has repeatedly recognized that original Indian title creates legal and equitable rights. *Johnson* v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. ed. 681; *U. S.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 86 L. ed. 260; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 82 L. ed. 1213; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. ed. 1219; *Worcester* v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. ed. 483; *Mitchel* v. *United States*, 9 Pet. (U. S.) 711, 9 L. ed. 283; *Chouteau* v. *Molony*, 16 How. (U. S.) 203, 14 L. ed. 905; *Holden* v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523; *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. ed. 330,

7 S. Ct. 100; *Cramer* v. *United States*, 261 U. S. 219, 67 L. ed. 622, 43 S. Ct. 342; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 S. Ct. 360; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 S. Ct. 650.

Such rights are legally enforceable against everyone except the sovereign who cannot be sued without his consent. Where such consent has been given, as in this case, they are enforceable against the United States in the same manner and to the same extent as against anyone else.

The United States has the sovereign power to go beyond the rights growing out of its title. This power is because "the King can do no wrong," and the Government cannot be sued without its consent, but any exercise of power in violation of the Indians' rights can form the proper subject matter for a jurisdictional act.

To be sure the exercise of such arbitrary sovereign power is effective for all purposes and it was effective here. By the use of such power the Government effectually acquired the full title to the Indians' land. It passed it on to its grantees and no one could question their title. That was true in the Shoshone case where the Government without let or hindrance acquired title to one-half interest in the Shoshone's lands. However, the act of the Government in that case was made the subject of a jurisdictional act and the Indians recovered. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

In the instant case the Indians had complete Indian title. The Government had the naked fee. The Government dispossessed the Indians and took their lands without compensation. This was not in pursuance of rights growing out of the naked fee. They could not sue the Government for

thus violating their rights. They had a valid but unenforceable claim against the Government. The jurisdictional act gave Respondents the right to assert the claim by proving their Indian title. This the Court's unchallenged findings show was done.

After the Government has waived its sovereignty and consented to be sued, it is wholly untenable to permit a successful defense based on the exercise of its arbitrary sovereign power.

Petitioner contends there is a difference between a title in a reservation recognized by treaty or act of Congress on the one hand and Indian title by aboriginal possession on the other. The former could not be any stronger than the latter because it is as sacred as the fee. Petitioner grants that the taking by eminent domain of the land held under the recognized title is a proper subject for claim (Pet. p. 12). Petitioner then states that "the extinguishing of aboriginal Indian title creates at most only a moral obligation." In the Shoshone case the Government contended that the right to use and occupy the land of the reservation which was granted by the treaty did not include the ownership of the timber and minerals but the court there said that "the tribe *had the right of occupancy with all its beneficial incidents; that the right of occupancy being the primary one and as sacred as the fee,* division by the United States of the Shoshones' right with the Araphahoes was an appropriation of the land pro tanto; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians it did not have power to give to others or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that would be not the exercise of guardianship or management, but confiscation." (Italics supplied.)

It will thus be seen that the Court did not regard aboriginal title in that case to have been enhanced or changed by the treaty. In the case of *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, the Court stated:

> "1. The United States contends that the lower court erred in including the value of timber. The tract taken was a part of the reservation *retained by plaintiffs out of the country held by them in immemorial possession*, from which was made the cession by the treaty of October 14, 1864. The clause declaring that the district retained should, until otherwise directed by the President, be set apart as a residence for the Indians and 'held and regarded as an Indian reservation' *clearly did not detract from the tribes' right of occupancy.* The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the lands taken." (Italics supplied.)

The Supreme Court has indicated that whether the land was in a reservation or unceded lands does not change the title. We quote:

> "While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract." *Minnesota* v. *Hitchcock*, 46 L. ed. 954, 963; 185 U. S. 373, 388.

The existence of rights growing out of title by aboriginal possession without recognition is so clearly stated in the brief of the United States in the case of *United States* v. *Santa Fe RR. Co.*, 314 U. S. 339, that we respectfully refer the Court to that brief. The presentation of authorities and the reasoning in the Government's brief therein constitute one of the clearest statements on the subject.

This brief of the Government was in answer to the precise position now taken by the Petitioner in this case.

The contention of the Santa Fe Railroad, which the Supreme Court rejected, was stated in its brief as follows:

> "* * * political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey, supra, Hayt* v. *United States,* 38 Ct. Cls. 455, *Duwamish et al., Indians* v. *United States,* 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe, et al.* v. *The United States,* 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), * * *."

It will thus be seen that the Santa Fe Railroad brief even cited the cases relied upon to support the petition in the case at bar.

In a vigorous reply brief in the Santa Fe case the Government again reviewed the cases cited in its original brief and then adds the following footnote:

> "The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hayt* v. *United States,* 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that 'Indian country' in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely based on the opinion of this Court in *United States* v. *Joseph,* 94 U. S. 614 (1876), was definitely repudiated in *United States* v. *Candelaria,* 271 U. S. 432 (1926),

and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held that relinquishment of aboriginal possessions was valid consideration for an agreement by the United States." (Reply Brief of the Government in *United States* v. *Santa Fe Pacific Railroad Co.*, p. 34.)

This Honorable Court sustained the position outlined in the brief of the United States and held:

> "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer Case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U. S. at 229, 67 L. Ed. 626, 43 S. Ct. 342." *United States* v. *Santa Fe RR. Co.*, 314 U. S. 339.

The Santa Fe case was an action taken by authority of the Attorney General without any authority by Congress and the Court adjudicated the title. This shows that the title does not depend upon congressional recognition.

Legislative and Executive Construction

The report of the Secretary of Interior and the passage of the bill by Congress indicates that both the Executive and the Legislative branch of the government construed this act as providing that the Indians proving aboriginal title should be paid for such lands. The report by Honorable Harold L. Ickes, Secretary of Interior, recommends the passage of the bill bearing the present language and states:

> "The Indians are of the belief that their claims are valid and that the provisions of the ratified treaties

have not been fully carried out. *They are also of the opinion that they should be paid for the lands under the unratified treaty.*" (Italics supplied.)

This was quoted in the reports on the bill by both House and Senate Committees. H. Rep. No. 1085 and S. Rep. No. 795, 74th Cong., 1st Sess.

The Jurisdictional Act

We desire to dispute sharply the Petitioner's statement in a footnote that in the three cases cited "The Court of Claims found it unnecessary to pass upon the government's liability as a matter of law * * *" (Petition, p. 11).

The cited cases do not support Petitioner's position. On the contrary the cases definitely show that where the Jurisdictional Acts granted the power, the Court would adjudicate the rights acquired by occupancy.

The Jurisdictional Act in the Coos Bay Tribe of Indians v. *U. S.*, 87 Ct. Cls. 143, *is precisely the same as in the case at bar.* Now bearing that in mind let us examine it.

The whole opinion was based upon the assumption that the Jurisdictional Act gave the Court the authority to adjudicate the rights based upon Indian occupancy. Without any suggestion by the Court that it did not have such right, the evidence was carefully analyzed by the Court and held to be insufficient to support the allegations of the complaint. There was no suggestion that the complaint was not good.

The Court was demonstrating, first, that the Government had not recognized the Plaintiff's title to this land (which would have obviated further proof) and therefore that possession must be proved; and second, that the proof was insufficient.

Now consider the case of *The Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378. The holding there was not, that a

a tribal claim to any particular lands must be based upon a treaty, statute or other formal governmental action, but that the Jurisdictional Act did not authorize the Court to make adjudication on aboriginal occupancy.

However, the case of *Wichita Indians, et al.* v. *U. S., supra,* in emphasizing the lack of proper language in the Jurisdictional Act there pointed to the case of *The Assiniboine Tribe* v. *U. S.*, 77 Ct. Cls. 347, and the *Coos Bay Indian* case, 87 Ct. Cls. 143, as illustrations of jurisdictional acts which specifically confer jurisdiction and authority to adjudicate and render judgment on an occupancy title. We quote from the *Wichita* case:

> "In *Assiniboine Indian Tribe v. United States, supra,* the jurisdictional act, as amended, specifically conferred jurisdiction and authority to adjudicate and render judgment on a use and occupancy title by immemorial possession. This court held that a claim to title to lands based on immemorial possession could not be sustained where the evidence showed that other tribes similarly occupied and possessed such territory. In *Coos Bay Tribe of Indians case, supra,* the jurisdictional act also specifically authorized jurisdiction and entry of judgment upon the claim 'arising under or growing out of the original Indian title, claim, or rights of the said tribe * * *.'" (*Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378 at 419.)

Therefore unless this Court should overthrow this logical line of decisions the holding sought for by the Petitioner must be denied. This for the reason that the Court in the *Wichita* case expressly holds that the Jurisdictional Act in the *Coos Bay case,* "specifically authorized jurisdiction and entry of judgment upon," such a claim. The language of the jurisdictional Act in the case at bar is exactly the same as that quoted by the Court in the *Coos Bay* case.

We also wish to dispute Petitioner's statement in the same footnote (Pet. p. 11) that the *Duwamish* case, 79 C. Cls. 530, supports its position.

The jurisdictional act in that case dealt only with certain treaties or acts of Congress, and the Court of Claims held that it had no jurisdiction to adjudicate claims not specifically mentioned.

The Court below answered Petitioner's inaccurate contention by saying: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title" (R. 76).

It is crystal clear that the Court in the *Duwamish* case was dealing with a Jurisdictional Act which did not, as in the *Coos Bay* case and the present case, specifically confer jurisdiction and authority to adjudicate and render judgment in a claim arising under or growing out of the original Indian title, claim or rights of said tribe.

Wherever the Jurisdictional Act has conferred such jurisdiction the Court of Claims has not hesitated to exercise it and the distinction between a Jurisdictional Act giving the right and one failing to give the right is illustrated quite clearly in *Wichita Indians* v. *U. S.*, 89 Ct. Cls. 378 at 419.

See also cases cited in the opinion of the Court of Claims in this case.

The opinion of the Court of Claims in this case is the clearest statement on the subject. We quote:

> "From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensation for having been deprived by the United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian

title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is a 'question of fact to be determined as any other question of fact.' *United States, as Guardian of the Hualpai Indians of Arizona,* v. *Santa Fe Pacific Railroad Co.,* 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States,* 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States,* 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States,* 79 C. Cls. 530. *The Crow Nation or Tribe of Indians of Montana* v.

United States, 81 C. Cls. 238, 269 U. S. 281; *The Wichita Indians, et al.* v. *United States, supra;* and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. —." (R. 70-72).

Recognition

Recognition was shown. *In addition* to what the lower Court so succinctly pointed out we might add:

1. The quotation from the letter of the Commissioner of Indian Affairs to Joel Palmer, August 12, 1854: (Senate Executive Document numbered 25, Fifty-third Congress, first session, p. 22)

> "Sir: You have been designated by the President of the United States as the officer of the Indian Department to negotiate treaties of peace *and acquisition* with the Indian tribes in Oregon, as provided for by a clause of the first section of the act of Congress approved July 31, 1854, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department.'
>
> "The clause referred to is as follows:
>
> " 'For the expenses of negotiating treaties with and making presents of goods and provisions to the Indian tribes in the Territory of Oregon, sixty-eight thousand dollars.'
>
> • • • • • • •
>
> "You will furnish me with a skeleton map of Oregon Territory, showing the *location of the different Indian tribes*, with the extent of territory claimed by each, and the nature of the tenure or claim, and as treaties are made designate the reserve provided for Indian use, with such precision that it may be laid down on the map here." (Italics supplied.)

2. The detailed report of Gen. Palmer showed who had title. It was his official duty under his appointment by the

President (acting under authority of the Act of July 31, 1854) to ascertain the location of the several tribes of Indians who occupied and held possession thereof and to secure the signatures of the bands and tribes of Indians whose title to the lands was to be extinguished. His report was a recognition of the aboriginal possession *as to Respondent tribes who are given judgment here* for he describes their lands. (Senate Document numbered 25, Fifty-third Congress, first session, pp. 22 to 32).

This was approved by the Commissioner of Indian Affairs who under the law had the responsibility thereunder in the following language:

> "The extent of country *to which the Indian title is by these articles relinquished* is estimated at about 5,000,000 acres, and the extent of the reservation at 750,000 to 800,000 acres. The reserve, it will be observed, lies within the limits reserved from sale by order of the President of the 9th of November, A. D., 1855." (Senate Document numbered 25, Fifty-third Congress, first session, p. 8)

It was approved by the Secretary of the Interior and by the President when he sent it to the Senate for consent to its ratification.

3. The army officers under the authority of the War Department cooperating with Indian agents moved them from their lands on to the reservation. Paid their fare out of the Government's money at so much per head. There was also the *payment of earnest money*, under direction of Congress in keeping with the terms of the treaty. (Article 3 of the unratified treaty. See Senate Document numbered 25, Fifty-third Congress, first session, pp. 49-57).

4. In 1868 the Congress in an appropriation act recognized the reservation as originally created by executive order. This was after the Presidential order of 1865 taking

away tract 479, part of the Coast reservation. The Act reads:

> "For Indians upon the Siletz reservation, Oregon, to provide agricultural implements, seeds, cattle, and so forth, to compensate them for losses sustained by reason of executive proclamation taking from them that portion of their reservation called Yaquina Bay, six thousand dollars" (Act of July 27, 1868, 15 Stat. 218).

Geo. W. Manypenny, Commissioner of Indian Affairs, in his report to the Secretary of Interior (Senate Document numbered 25, Fifty-third Congress, first session, p. 8) had made the following statement when commenting on the reserve set out in the unratified treaty:

> "The reserve it will be observed lies within the limits reserved from sale by order of the President of the 9th of November A. D. 1855" (Senate Document numbered 25, Fifty-third Congress, first session, p. 8).

5. Annual Reports of the Commissioner of Indian Affairs officially communicated by the Secretary of Interior to Congress show many recognitions of the Indian title to the lands which the Court's opinion held belonged to Respondent Indian tribes. Some of these quotations from these annual reports are from the Superintendent of Indian Affairs, some from U. S. Indian Agents and some are the Commissioner's own language. We shall give only a few dates and quotations:

1863

> "• • • The Indians relying upon the promises made by the former Superintendent Palmer by whom the treaty was negotiated promptly removed to the stipulated reservation without awaiting the ratification of the treaty. They now complain and justly, that they have sold *all their former possessions which have been taken possession of by the whites* and that they have

realized none of the benefit which they were assured would result from the treaty. • • •

"• • • But as the Senate failed to ratify the treaty *the title to the whole territory above specified is still vested in the Indians, the white settlers thereon are but trespassers upon Indian lands*" (Annual Rep. p. 9).

1862

"• • • They say 'they made a treaty with the government, *sold their lands, abandoned their country,* and in compliance with the stipulations of said treaty they removed to this reservation where they had continued to live and in doing so have fulfilled their part of the agreement but not so the government. On the contrary it never has ratified the treaty and has done nothing but pay them in promises for the land abandoned. This treaty they say was made many years ago and they have waited patiently for their Great Father to fulfill his promises but they cannot wait much longer.' *"I have done and said everything in my power to convince them that the government will yet fulfill its promises and act in good faith but all to no purpose"* (Annual Rep. p. 60).

1864

"• • • They abandoned large tracts of land to the United States, now occupied by the whites, and promptly removed upon the reserve proposed for their residence, and have since continued to reside upon it. • • •"

"• • • *They were induced to remove to the reservation by late Superintendent Joel Palmer in 1855 and a treaty for the purchase of their lands concluded.* The senate failed to ratify the treaty and they have consequently never received anything under it. But their part of the stipulation have all been complied with. *They gave up their lands* and they have since been occupied by whites. • • •" (Italics supplied.)

"• • • They have waited anxiously for ten years for the fulfilment of the promises made to them *when*

they surrendered their lands to the United States" (Annual Rep. p. 11.)

1867

"• • • *They then ceded their lands* and removed to the Coast reservation, (Siletz agency,) expecting that the government would fulfil its part in carrying into effect the stipulations of that treaty; but in this they have been greatly disappointed. • • •"

"• • • By the terms of the treaty *the Indians ceded all their lands,* and agreed to remove to the coast reservation; in consideration the government promised to pay certain annuities, to build mills, provide schools, physicians, open farms, erect buildings, &c. This treaty the Senate refused to ratify, and it has therefore not been held to be binding upon the United States; but the Indians fully complied with the terms of their side of the treaty, abandoned their lands, removed to the reservation designated for them, and have, with few exceptions, remained there since. White settlers occupied their lands, and still occupy them. The Indians complain, and justly I think, that having complied with their side of the treaty, we ought to comply with ours • • •" (Annual Rep. p. 7).

1871

"As an officer of the United States Indian Department, I demand, in behalf of the Indians of Oregon, that their rights be regarded, and justice done them in some way, either by paying them *for their lands,* or allowing them to locate homes in common with the white men who are making the Indian country so valuable. This subject is one that concerns the welfare of thousands of white people settled on the lands still claimed by these Indians. The importance of prompt action is manifest, when it is known that some of them have already taken council of able lawyers, who give them encouragement to prosecute their claims. • • •." (Annual Rep. p. 721.) (All italics supplied.)

These are documents of which this Court takes judicial notice. They were introduced as a chain in the proof of

occupancy. However, they also show recognition of the most definite kind.

They constitute abundant rec nition of the Indians' title to the lands from which ey had been dispossessed and as was said about simil reports in a case in the Supreme Court, "these reports were officially communicated by the Secretary of the Interior to Congress and there is nothing to show any disapproval. * * *" *Donnelly* v. *U. S.*, 228 U. S. 243 at 258; 57 L. Ed. 820 at 826.

Conclusion

Respondents had the title "as sacred and as securely safeguarded as is a fee simple absolute title." This was shown when the proof was made of their aboriginal possession and occupancy. Recognition though not necessary has been shown. That the Government took it for its own public use without compensation is admitted. Respondents lacked only the authority to sue the Government. This the jurisdictional act gave in unequivocal language.

We respectfully submit that the Petition for writ of certiorari should be denied.

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September, 1945.

APPENDIX

(Public—No. 332-74th Congress)
(S. 2761)

An Act

Conferring jurisdiction upon the Court of Claims to hear and determine claims of certain bands or tribes of Indians residing in the State of Oregon.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853, (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143) and December 21, 1855 (12 Stat. 981), may have against the United States; and (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast

Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; and any payment which may have been made under any claim or agreement shall not operate as an estoppel but may be pleaded as a set-off, and the United States shall be allowed to plead, and shall receive credit for all sums including gratuities, paid to or expended for the benefit of the respective tribes or bands of Indians, but no expenditures for the benefit of these Indians made out of appropriations authorized by the Act of June 18, 1934, (48 Stat. L. 984), shall be considered as offsets. The claim or claims of each tribe or band may be presented separately or jointly by petition, subject, however, to amendment and consolidation in proper cases. Such action or actions shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any nation, tribe or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court.

The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this act.

Official letters, papers, documents and public records, or certified copies thereof, may be used in evidence and the departments of the Government shall allow the attorney or attorneys access to such treaties, papers, correspondence, or records as may be needed by said attorney or attorneys.

Sec. 3. That upon the final determination of such suit, or suits, the Court of Claims shall decree such fees not exceeding 10 per centum of the amounts recovered as it

shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, together with all necessary and proper expenditures incurred in the preparation and prosecution of the suit or suits.

Sec. 4. The proceeds of all amounts, if any, recovered for said Indians, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled therefor and shall draw interest at the rate of 4 per centum per annum from the date of the original judgment or decree and thereafter shall be subject to appropriation by Congress.

Approved, August 26, 1935.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387 26

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

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INDEX

	Page
Opinion below	1
Statement of the controversy	1
Judicial definition of the meaning of the term "Original Indian Title"	2
Questions submitted are judicial	4
Similar to Klamath case	5
No difference in title before and after treaty recognition	9
The right to take the Indians' lands without compensation did not grow out of the government's title of naked fee	11
Legislative and executive construction	15
The jurisdictional Act Held Sufficient	16
Recognition shown by enumerated legislative and executive acts	20
Conclusion	27
Appendix	Separately printed

CITATIONS

Cases:

Assiniboine Indian Tribe v. *U. S.*, 77 C. Cls. 347	17, 19
Barker v. *Harvey*, 181 U. S. 481, 45 L. Ed. 963	7
Bates v. *Clark*, 95 U. S. 204, 24 L. Ed. 471	3
Beecher v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440	11
Buttz v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330	3, 4, 11
California & Oregon Land Co. v. *Worden*, 85 Fed. Rep. 94	10
Chouteau v. *Molony*, 16 How. (U. S.) 203, 14 L. Ed. 905	11
Coos Bay Indian Tribe et al. v. *U. S.*, 87 C. Cl. 143,	14, 16, 17, 19
Cramer v. *U. S.*, 261 U. S. 219, 67 L. Ed. 622	11
Crow Nation or Tribe v. *U. S.*, 81 C. Cls. 238, 269 U. S. 281	20
Donnelly v. *U. S.*, 228 U. S. 243, 258, 57 L. Ed. 820, 826	27

Page

Duwamish et al. Indians v. *U. S.*, 79 C. Cls. 530 14, 18, 19
Foster v. *Nelson*, 2 Pet. 254 6
Hayt v. *U. S.*, 38 C. Cls. 455 14
Holden v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523 11
Johnson v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681 11
Kang-Gi-Shun-Ca, Ex Parte: In the Matter of, 109 U. S. 556, 27 L. Ed. 1030 3
Klamath and Moadoc Tribes v. *U. S.*, 85 C. Cls. 451 8
Leavenworth, L. & G. R. Co. v. *U. S.*, 92 U. S. 733, 23 L. Ed. 634 11
Minnesota v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954 11, 14
Mitchell v. *U. S.*, 9 Pet. (U. S.) 711, 9 L. Ed. 283 11
Northwestern Bands of Shoshone Indians v. *U. S.*, 95 C. Cls. 642, 324 U. S. — 20
Seminole Nation v. *U. S.*, 316 U. S. 286 10
Shoshone Tribe v. *U. S.*, 299 U. S. 476 2, 10, 12
Shoshone Tribe v. *U. S.*, 82 C. Cls. 23, 299 U. S. 476 19
Spalding v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469 10, 11
U. S. v. *Arredondo et al.*, 6 Pet. (U. S.) 691, 8 L. Ed. 547 7
U. S. v. *Candelaria*, 271 U. S. 432 15
U. S. v. *Chavez*, 290 U. S. 357 15
U. S. v. *Cook*, 19 Wall. 593 9
U. S. v. *Joseph*, 94 U. S. 614 15
U. S. v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219 2, 5, 8, 10, 11
U. S. v. *Santa Fe Pac. Railroad*, 314 U. S. 339, 86 L. Ed. 260 4, 7, 8, 10, 11, 14, 15, 19, 20, 21
U. S. v. *Shoshone Tribe*, 304 U. S. 111, 82 L. Ed. 1213 3, 11
U. S. v. *Title Ins. & T. Co.*, 265 U. S. 472, 68 L. Ed. 1110 8
Ute Indians v. *U. S.*, 45 C. Cls. 440 15
Wichita Indians et al. v. *U. S.*, 89 C. Cls. 378 17, 18, 20
Worcester v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. Ed. 483 11, 21

Statutes and Treaties:

Special Jurisdictional Act of August 26, 1935 (49 Stat. 801) Appendix, p. 1
Act of June 30, 1834 (4 Stat. 729) 20

Page

Act of August 14, 1848 (9 Stat. 323) (See Appendix, p. 17 for text) 21
Act of June 5, 1850 (See Appendix p. 18 for text) 20
Act of July 31, 1854 23
Treaty of Wyandot (August 3, 1795, 7 Stat. 49) 2
Unratified Treaty of August 11, 1855 2, 24
Ordinance of 1787 (See Appendix, p. 20 for text) 22

Miscellaneous:

Senate Rep. No. 795, 74 Congress, 1st Session 16
House Rep. No. 1085, 74 Congress, 1st Session 16
Senate Document No. 25, 53rd Congress, 1st Session 23, 24
7 Op. Atty. Gen. 293 (1855) 3, 22
Annual Report of Commissioner of Indian Affairs, 1862 25
Ibid., 1863 24
Ibid., 1864 25
Ibid., 1867 25
Ibid., 1871 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the Court of Claims (R. 21-83) is reported in 59 F. Supp. 934.

Statement of the Controversy

Since some of the findings relate to respondents who were denied recovery and this appeal is limited to those who recovered, we quote in Appendix p. 4-17 the salient parts of the findings relating to the question raised by this appeal. We shall use the word respondents in the brief as meaning the respondents who were successful below. There was no appeal by the unsuccessful respondents who were held not to have come within the jurisdictional act.

The findings show that respondents had original Indian title by immemorial occupancy and possession to the de-

scribed lands; that the government started in to obtain the title by treaty but before its ratification because of the trouble with other Indians the lands were quickly acquired by the involuntary removal of the Indians by the government; that such lands were taken by the Government for a public use without compensation and that such taking was thereafter ratified and confirmed and became an appropriation of the lands under the power of eminent domain. *Shoshone Tribe* v. *United States*, 299 U. S. 476, at 495; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119.

The jurisdictional act (Appendix 1) contained two separately numbered clauses.

Clause (a), not involved herein, provided for the recovery on claims growing out of treaties; and Clause (b) conferred jurisdiction to hear, adjudicate and render judgment in and upon "any and all legal and equitable claims arising under or growing out of the original Indian title, claim or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described" in the unratified treaty of August 11, 1855, "at and long prior to the dates thereof."

This land lay to the west of the treaty acquired lands between the Coast Range and the Pacific Ocean and embraced lands, a part of which the Court of Claims held were taken from respondents by the Government. The court held respondents had a right to recover (R. 84). Petitioner claims error on the ground that the Indian title was not specifically recognized by treaty or by act of Congress.

Judicial Definition of the Meaning of the Term "Original Indian Title"

This term has a definite meaning. As early as 1795 the term "Indian title" was used three times in Article IV of the treaty of Wyandot (August 3, 1795, 7 Stat. 49). That

term had been used many times before it was used in the jurisdictional act. It was used in describing original Indian occupancy claims as to this very territory in 1855: "• • • Idea suggested • • • that any white settler may rightfully take possession of any lands occupied by the Indians prior to the *extinguishment of their occupancy title.* This idea is too absurd to admit of a reasoned reply" 7 Op. Atty. Gen. 293, 299; Opinion below R. 75; see also *Buttz* v. *Northern Pac. R. R. Co.*, 119 U. S. 55; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 116; 82 L. Ed. 1213.

The term "original Indian title" was the appropriate term. *Bates* v. *Clark*, 95 U. S. 204, 24 L. Ed. 471. In another case (approving *Bates* v. *Clark*, 95 U. S. 204, 24 L. Ed. 471) the Supreme Court says:

> "• • • This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204 (XXIV, 471) decided at the October Term, 1877. It was said in that case by *Mr. Justice* Miller, delivering the opinion of the court, that 'It follows from this that all the country described by the Act of 1834 as Indian country remains Indian country so long as the *Indians retain their original title* to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by Act of Congress.' In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, • • •" *Ex Parte: In the Matter of Kang-Gi-Shun-Ca*, 109 U. S. 556 at 561; 27 L. Ed. 1030 at 1032. (Italics supplied)

The respective titles, sovereign naked fee and Indian title, each carried "rights".

> "• • • Whilst thus claiming *a right* to acquire and dispose of the soil, the discoverers recognized a

right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian *right of occupancy.* The chief justice adds that the history of America, from its discovery to the present day, *proves the universal recognition of this principle.*" *Buttz v. Northern Pac. R. R. Co.*, 119 U. S. 55, 67; 30 L. Ed. 330, 335. (Italics supplied)

The jurisdictional act, with the apt precision based upon the adudicated definitions, used the terms "Rights" (*U. S. v. Santa Fe and Pacific R .R. Co.*, 314 U. S. 339) and "Original Indian title" for parties to an "unratified treaty" which precludes the idea of treaty recognition. While the term "Indian title" might apply to a title which had grown out of a treaty reservation as well as the original Indian title, the term "Original Indian title" had a definite meaning and referred only to the Indian occupancy title which depended upon the fact of occupancy exclusive of recognition by treaty or act of Congress.

To further support the definition of "original Indian title" the jurisdictional act uses the language "occupied by the Indian tribes and bands described in the unratified treaties" (it was one treaty signed by various tribes on different dates) "at and long prior to the dates thereof" (R. 2).

Congress could not have couched the act in clearer, more definite or unambiguous terms.

Questions Submitted Are Judicial

There are no political questions submitted to the court. Those have already been decided by other branches of the Government. The first question to be decided was whether they should take the lands. The Government decided to do so. The second question to be decided was whether the

Government should acquire it by treaty, conquest or eminent domain. After starting to acquire the Indian lands by treaty the Government through its Indian Agency aided by the Army decided to take it over at once; and later the Government decided to confirm the taking by keeping the fruits thereof, and by subsequent laws and approved executive acts to further confirm the taking under the power of eminent domain. Having done so the next question was whether the Government should make compensation. This it might do by direct appropriation; or waiving sovereignty, lapse of time, statutes of limitation, and the doctrine of estoppel, submit it to the Court of Claims for an adjudication which should "settle the rights of the parties thereto both legal and equitable." This latter method was selected by the Congress.

Similar to Klamath Case

In the *Klamath* case, 304 U. S. 119 the Congress after many years had provided payment for the lands taken by the Government by eminent domain and obtained a full release from the Indians. In the absence of a proper jurisdictional act the courts were bound to this political decision. However, thereafter by act of Congress the release was waived and the Congress submitted to the Court of Claims the whole question of the taking and compensation; and, as in this case, the court rendered judgment in favor of the Indian tribe. This was a proper judicial question, made so by the act of Congress.

Even if some phases had been of a political nature, a jurisdictional act was proper in both the *Klamath* case and the present case. The clearest statement on that subject is in a Supreme Court opinion which we quote:

"• • • The laws under which we now adjudicate on the rights embraced in the treaty and its instruc-

tions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. When the construction of this treaty was under the consideration of the court in the case of *Foster and Elam* v. *Nelson* (2 Pet., 254, 99), it was under very different circumstances. The plaintiff claimed a title to the land in controversy under a Spanish grant prior to the treaty, which he alleged was confirmed by the eighth article; he stood simply on his right, without any act of Congress authorizing the suit, or conferring on the court any extraordinary powers. • • •

"'This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow the action of the other departments of the government; • • •

"• • • But this case assumes a very different aspect. The only question depending is whether the claimants or the United States are the owners of the land in question. *By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question which we are now bound to decide as between man and man,* on the same subject matter and by the rules which Congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same, form one of four distinct ones. We must therefore be distinctly understood as not in the least impairing, but affirming the principle of *Foster* v. *Nelson.* As the law giving jurisdiction to hear and determine this case not only authorizes but requires us to decide it according to law of nations and the stipulations of the treaty, we shall consider 'that it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and is never refused.'

• • • • • • • • • •

"Congress have disclaimed its decision as a political question for the legislative department to decide, and enjoined it on us as one purely judicial.

"* * * The United States do not come into court claiming this cession and renunciation as vesting them with the whole territory in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations of parts of it or not, at their pleasure; but require us to finally decide between them and the claimants as grantees from the same grantor, which grant carries the title to the land. * * *" (*U. S.* v. *Arredondo et al.*, 6 Peters 691, 8 L. Ed. 547 at 554.) (Italics supplied)

If two persons each have separate and distinct rights in property, and one by superior power takes all the rights of the other, it is quite plain that the injured party has a claim against the other "as between man and man".

In the case of *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339, 86 L. Ed. 260, the court cites with approval the case of *Barker* v. *Harvey*, 181 U. S. 481, 45 L. Ed. 963, which shows that determination of the Indian title by occupancy can appropriately be delegated. The court says:

"These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. at L. 631, chap. 41, passed to ascertain and settle certain land claims in California. Under Sec. 13 of that Act 'all lands the claims to which shall not have been presented' to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, 'within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.' This Court passed on that Act in Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 S. Ct. 690. The plaintiff there claimed under two Mexican grants. *The defendants were Indians who claimed a right of permanent occupancy;* but they had not presented their claims to the commissioners within

the time specified by Sec. 13. This Court held that as a result of that failure their claims were barred. And see United States v. Title Ins. & T. Co., 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621, supra. *That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy.*" (*U. S. v. Santa Fe Pac. R. R. Co.*, 314 U. S. 339, 86 L. Ed. 260, 271.) (Italics supplied.)

The question of fact that the Indian tribes had original Indian title was actually adjudicated in the case of *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; 82 L. Ed. 1219; 85 Ct. Cls. 451.

The second finding of the Court of Claims stated "In 1864 Plaintiffs held by immemorial possession a larger area of land • • •" which included the lands in litigation. *Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cls. 451 at 454. On appeal to the Supreme Court this Court stated: "The findings show: *In 1864 Plaintiffs held by immemorial possession* • • •. *The tract taken was a part of the reservation retained by plaintiffs out of the country held by them in immemorial possession* from which was made the cession by the treaty of Oct. 14, 1864. The clause declaring that the district retained should until otherwise directed by the President be set apart as a residence for the Indians and 'held and regarded as an Indian reservation' did not detract from the tribes' *right of occupancy.* The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the land taken." *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; at 122-123. (Italics supplied.)

While it is true there was treaty recognition in that case, yet the value of the lands was determined upon *the*

adjudication of a prior original Indian title by immemorial possession.

No Difference in Title Before and After Treaty Recognition

There is no difference between Indian title recognized by treaty and original Indian title.

> "When this grant was made, the right of occupancy of the Indian tribes in the territory including the reservation had not been extinguished. The fee was in the United States, subject to this right. This right is referred to by the Supreme Court of the United States as a 'title,' as a right 'as sacred as that of the United States to the fee. * * * This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them.' U. S. v. Cook, 19 Wall. 593. For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands. And this right, title, or interest has never been surrendered by them. The treaty cedes to the United States all the right, title, and claim of the Indian tribes to all the country claimed by them, the same being described by boundaries which include the reservation. This section is followed by a proviso as follows: 'Provided, that the following described tract within the territory ceded by this treaty, shall, until otherwise directed by the president of the United States, be set apart as a residence for said Indians, and held and regarded as an Indian reservation.' Then follows a description of the reservation. It is argued that this cession extinguishes the Indian right to the entire Indian country, and the proviso establishes a new right, which, being new, is subordinate to the prior road grant. *The Indian right under the treaty, as to the particular lands, is precisely what it was before the treaty. By the terms of the*

treaty, the fee remains in the government, and the right of occupancy in the Indians, as before." (*California & Oregon Land Co.* v. *Worden*, 85 Fed. Rep. 94 at 94-97.) (Italics supplied.)

The full power rests in the Government to extinguish Indian title under treaty reservation just as it does to extinguish original Indian title.

> "The power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass the effect of the act was to extinguish so much of the Indian reserve as was embraced in the grant for canal purposes." (*Spalding* v. *Chandler*, 160 U. S. 394.)

The power to extinguish, by such method as it chose, the *recognized* Indian title to lands still remained in the Government. Such power did not bar claims growing out of the taking of such lands. *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe* v. *U. S.*, 299 U. S. 476.

Therefore the same power to extinguish the original Indian title does not militate against the claim in the case at bar. The "distinctive obligation," arising out of the guardianship status, forbade the taking for its own use without compensation of the property of the ward even though the *power* to do so was present. *Seminole Nation* v. *United States*, 316 U. S. 286 at 296 and cases cited; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe* v. *U. S.*, 299 U. S. 476.

That the guardianship status exists with reference to lands held by original Indian title is shown by the case of *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339.

The Right to Take the Indians' Lands Without Compensation Did Not Grow Out of the Government's Title of Naked Fee.

No new question is presented on this appeal.

The salient points have all been many times decided. The complete title to Indian tribal lands, whether held under aboriginal title or by reservation, are concurrently shared by the Indian tribe and the United States Government. The Indian part in such title is a right of perpetual occupancy as sacred as the fee simple. The United States part in such title is the naked fee.

For more than a century this court has repeatedly recognized that original Indian title creates legal and equitable rights. *Johnson* v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; *U. S.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 86 L. Ed. 260; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 82 L. Ed. 1213; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219; *Worcester* v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. Ed. 483; *Mitchel* v. *United States*, 9 Pet. (U. S.) 711, 9 L. Ed. 283; *Chouteau* v. *Molony*, 16 How. (U. S.) 203, 14 L. Ed. 905; *Holden* v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523; *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, 7 S. Ct. 100; *Cramer* v. *United States*, 261 U. S. 219, 67 L. Ed. 622, 43 S. Ct. 342; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. Ed. 634; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469, 16 S. Ct. 360; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954, 22 S. Ct. 650.

Such rights are legally enforceable against everyone except the sovereign who cannot be sued without his consent. Where such consent has been given, as in this case, they are enforceable against the United States in the same manner and to the same extent as against anyone else.

The United States has the sovereign power to go beyond the rights growing out of its title. This power is because "the King can do no wrong," and the Government cannot be sued without its consent, but any exercise of power in violation of the Indians' rights can form the proper subject matter for a jurisdictional act.

To be sure the exercise of such arbitrary sovereign power is effective for all purposes and it was effective here. By the use of such power the Government effectually acquired the full title to the Indians' land. It passed it on to its grantees and no one could question their title. That was true in the *Shoshone* case where the Government without let or hindrance extinguished title to one-half interest in the Shoshone's lands. However, the act of the Government in that case was made the subject of a jurisdictional act and the Indians recovered. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

In the instant case the Indians had complete original Indian title. The Government had the naked fee. The Government dispossessed the Indians and took their lands for a public use without compensation. This was not in pursuance of rights growing out of the naked fee. They could not sue the Government for thus violating their rights. They had a valid but unenforceable claim against the Government. The jurisdictional act gave Respondents the right to assert the claim by proving their original Indian title. This the Court's unchallenged findings show was done.

After the Government has waived its sovereignty and consented to be sued, it is wholly untenable to permit a successful defense based on the exercise of its arbitrary sovereign power.

Petitioner contends there is a difference between a title in a reservation recognized by treaty or act of Congress on the one hand and Indian title by aboriginal possession on the other. The former could not be any stronger than the

latter because it is as sacred as the fee. Petitioner grants that the taking by eminent domain of the land held under the recognized title is a proper subject for claim (Pet. p. 12). Petitioner then states that "the extinguishing of aboriginal Indian title creates at most only a moral obligation." In the *Shoshone* case the Government contended that the right to use and occupy the land of the reservation which was granted by the treaty did not include the ownership of the timber and minerals but the court there said that "the tribe *had the right of occupancy with all its beneficial incidents; that the right of occupancy being the primary one and as sacred as the fee,* division by the United States of the Shoshones' right with the Araphahoes was an appropriation of the land pro tanto; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians it did not have power to give to others or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that would be not the exercise of guardianship or management, but confiscation." (Italics supplied.)

The Supreme Court has indicated that whether the land was in a reservation or unceded lands does not change the title. We quote:

> "While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract."

Minnesota v. *Hitchcock*, 46 L. Ed. 954, 963; 185 U. S. 373, 388.

The existence of rights growing out of title by aboriginal possession without recognition is so clearly stated in the brief of the United States in the case of *United States* v. *Santa Fe R. R. Co.*, 314 U. S. 339, that we respectfully refer the Court to that brief. The presentation of authorities and the reasoning in the Government's brief therein constitute one of the clearest statements on the subject.

This brief of the Government was in answer to the precise position now taken by the Petitioner in this case.

The contention of the Santa Fe Pacific Railroad, which the Supreme Court rejected, was stated in its brief as follows:

> "• • • political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey, supra, Hayt* v. *United States*, 38 Ct. Cls. 455, *Duwamish et al., Indians* v. *United States*, 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe, et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), • • •."

It will thus be seen that the Santa Fe Pacific Railroad brief even cited the cases relied upon to support the petition in the case at bar.

In a vigorous reply brief in the *Santa Fe* case the Government again reviewed the cases cited in its original brief and then adds the following footnote:

> "The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hayt* v. *United States*, 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that 'Indian country' in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely

based on the opinion of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), was definitely repudiated in *United States* v. *Candelaria*, 271 U. S. 432 (1926), and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held that relinquishment of aboriginal possessions was valid consideration for an agreement by the United States." (Reply Brief of the Government in *United States* v. *Santa Fe Pacific Railroad Co.*, p. 34.)

This Honorable Court sustained the position outlined in the brief of the United States and held:

"Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer Case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U. S. at 229, 67 L. Ed. 626, 43 S. Ct. 342." *United States* v. *Santa Fe R. R. Co.*, 314 U. S. 339.

The *Santa Fe* case was an action taken by authority of the Attorney General without any authority by Congress and the Court adjudicated the title. This shows that the title does not depend upon congressional recognition.

Legislative and Executive Construction

The report of the Secretary of Interior and the passage of the bill by Congress indicate that both the Executive and the Legislative branches of the government construed this act as providing that the Indians proving aboriginal title should be paid for such lands. The report by Honorable Harold L. Ickes, Secretary of Interior, recommends

the passage of the bill bearing the present language and states:

> "The Indians are of the belief that their claims are valid and that the provisions of the ratified treaties have not been fully carried out. *They are also of the opinion that they should be paid for the lands under the unratified treaty.*" (Italics supplied.)

This was quoted in the reports on the bill by both House and Senate Committees. H. Rep. No. 1085 and S. Rep. No. 795, 74th Cong., 1st Sess.

The Jurisdictional Act Held Sufficient

We desire to dispute sharply the Petitioner's statement in a footnote of the petition that in the three cases cited "The Court of Claims found it unnecessary to pass upon the government's liability as a matter of law * * *" (Petition, p. 11).

The cited cases do not support Petitioner's position. On the contrary the cases definitely show that where the Jurisdictional Acts granted the power, the Court would adjudicate the rights acquired by occupancy.

The Jurisdictional Act in the Coos Bay Tribe of Indians v. *U. S.*, 87 Ct. Cls. 143, *is precisely the same as in the case at bar* as regards the point under discussion. Now bearing that in mind let us examine it.

The whole opinion was based upon the assumption that the Jurisdictional Act gave the Court the authority to adjudicate the rights based upon Indian occupancy. Without any suggestion by the Court that it did not have such right, the evidence was carefully analyzed by the Court and held to be insufficient to support the allegations of the complaint. There was no suggestion that the complaint was not good.

The Court was demonstrating, first, that the Government had not recognized the Plaintiff's title to this land (which

would have obviated further proof) and therefore that possession must be proved; and second, that the proof was insufficient.

Now consider the case of *The Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378. The holding there was not that a tribal claim to any particular lands must be based upon a treaty, statute or other formal governmental action, but that the Jurisdictional Act did not authorize the Court to make adjudication on aboriginal occupancy.

However, the case of *Wichita Indians, et al.* v. *U. S., supra,* in emphasizing the lack of proper language in the Jurisdictional Act there pointed to the case of *The Assiniboine Tribe* v. *U. S.*, 77 Ct. Cls. 347, and the *Coos Bay Indian* case, 87 Ct. Cls. 143, as illustrations of jurisdictional acts which specifically confer jurisdiction and authority to adjudicate and render judgment on an occupancy title. We quote from the *Wichita* case:

> "In *Assiniboine Indian Tribe v. United States, supra,* the jurisdictional act, as amended, specifically conferred jurisdiction and authority to adjudicate and render judgment on a use and occupancy title by immemorial possession. This court held that a claim to title to lands based on immemorial possession could not be sustained where the evidence showed that other tribes similarly occupied and possessed such territory. In *Coos Bay Tribe of Indians case, supra,* the jurisdictional act also specifically authorized jurisdiction and entry of judgment upon the claim 'arising under or growing out of the original Indian title, claim, or rights of the said tribe * * *.'" (*Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378 at 419.)

Therefore unless this Court should overthrow this logical line of decisions the holding sought for by the Petitioner must be denied. This for the reason that the Court in the *Wichita* case expressly holds that the Jurisdictional Act in the *Coos Bay* case, "specifically authorized jurisdiction and

entry of judgment upon," such a claim. The language of the Jurisdictional Act in the case at bar is exactly the same as that quoted by the Court in the *Coos Bay* case.

We also wish to dispute Petitioner's statement in the same footnote (Pet. p. 11) that the *Duwamish* case, 79 C. Cls. 530, supports its position.

The jurisdictional act in that case dealt only with certain treaties or acts of Congress, and the Court of Claims held that it had no jurisdiction to adjudicate claims not specifically mentioned.

The Court below answered Petitioner's inaccurate contention by saying: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title" (R. 76).

It is crystal clear that the Court in the *Duwamish* case was dealing with a Jurisdictional Act which did not, as in the *Coos Bay* case and the present case, specifically confer jurisdiction and authority to adjudicate and render judgment in a claim arising under or growing out of the original Indian title, claim or rights of said tribe.

Wherever the Jurisdictional Act has conferred such jurisdiction the Court of Claims has not hesitated to exercise it and the distinction between a Jurisdictional Act giving the right and one failing to give the right is illustrated quite clearly in *Wichita Indians* v. *U. S.*, 89 Ct. Cls. 378 at 419.

See also cases cited in the opinion of the Court of Claims in this case.

The opinion of the Court of Claims in this case is the clearest statement on the subject. We quote:

> "From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensation for having been deprived by the

United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is a 'question of fact to be determined as any other question of fact.' *United States, as Guardian of the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States*, 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530.

The Crow Nation or Tribe of Indians of Montana v. *United States*, 81 C. Cls. 238, 269 U. S. 281; *The Wichita Indians, et al.* v. *United States, supra;* and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. —" (R. 70 72).

Recognition Shown by Enumerated Legislative and Executive Acts

Finding 20 (R. 50) recites that respondents had a *recognized* original Indian title and the opinion of the Court below pointed out that, although recognition was not necessary, both an Act of Congress and an opinion of the Attorney General had in fact directly recognized such title (R. 74).

Various acts of recognition either set up in the findings or in statutes and documents of which this Court takes judicial notice are enumerated as follows:

1. The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over the territory of the Indian tribes of Oregon by the Act of June 5, 1850. That act contained in its title "for the extinguishment of their claims to lands." It provided for the appointment of Commissions to negotiate treaties with the several tribes for the extinguishment of their claims to lands lying west of the Cascade; provided for the appointment of a Superintendent of Indian Affairs and Indian Agents for the territory of Oregon; *and extended the law regulating trade and intercourse over the tribes* (Appendix pp. 18-20).

There was precisely the same situation as is so aptly described in the case of *United States* v. *Santa Fe Pacific RR. Co.*, 314 U. S. 339:

> "Certainly prior to 1865 any right of occupancy of the Walapais to the lands in question was not extinguished; nor was the policy of respecting such Indian title changed. The Indian Trade and Intercourse Act of

June 30, 1834, 4 Stat. at L. 729, chap. 161, was extended over 'the Indian tribes in the Territories of New Mexico and Utah,' by Sec. 7 of the Act of February 27, 1851, 9 Stat. at L. 574, 587, chap. 14. The 1834 Act which derived from the Act of July 22, 1790, 1 Stat. at L. 137, chap. 33, made it an offense to drive stock to range or feed 'on any land belonging to any Indian or Indian tribe, without the consent of such tribe' (Sec. 9, 25 U. S. C. A. Sec. 179); gave the superintendent of Indian affairs authority 'to remove from the Indian country all persons found therein contrary to law' (Sec. 10, 25 U. S. C. A. Sec. 220); made it unlawful to settle on 'any lands belonging, secured, or granted by treaty with the United States to any Indian tribe' (Sec. 11, 25 U. S. C. A. Sec. 180); and made invalid any conveyance of lands 'from any Indian nation or tribe of Indians.' Sec. 12, 25 U. S. C. A. Sec. 177. The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal government *to recognize such right of occupancy.* As stated by Chief Justice Marshall in Worcester v. Georgia, supra (6 Pet. (U. S.) p. 557, 8 L. Ed. 499), *the Indian trade and intercourse acts* 'manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, *and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.*'" (*U. S. v. Santa Fe Pac. RR. Co.*, 314 U. S. 339 at 347, 348; 86 L. Ed. 260 at 270.) (Italics supplied.)

2. The passage of the Act of August 14, 1848 (9 Stat. 323) creating the territory of Oregon which contained in Sec. 1 thereof the following: nothing herein contained "shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory *so long as such* rights shall remain unextinguished by treaty * * *" (Appendix, pp. 17-18).

This act (Sec. 14) further provided that "the inhabitants of the territory (Oregon) shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio by the Articles of Compact contained in the ordinance for the government of said territory" (Appendix 18).

This compact (Ordinance of 1787) provided "and should the public exigencies make it necessary for the common preservation to take any person's property or to demand his particular services, full compensation shall be made for the same." And further: "*The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress, but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them*" (Appendix, pp. 20-21).

3. The Opinion of the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299):

> "There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law" (R. 74-75).

4. The quotation from the letter of the Commissioner of Indian Affairs to Joel Palmer, August 12, 1854 (Senate

Executive Document numbered 25, Fifty-third Congress, first session, p. 22):

> "Sir: You have been designated by the President of the United States as the officer of the Indian Department to negotiate treaties of peace *and acquisition* with the Indian tribes in Oregon, as provided for by a clause of the first section of the act of Congress approved July 31, 1854, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department.'
>
> "The clause referred to is as follows:
>
> " 'For the expenses of negotiating treaties with and making presents of goods and provisions to the Indian tribes in the Territory of Oregon, sixty-eight thousand dollars.'
>
> * * * * * * *
>
> "You will furnish me with a skeleton map of Oregon Territory, showing the *location of the different Indian tribes*, with the extent of territory claimed by each, and the nature of the tenure or claim, and as treaties are made designate the reserve provided for Indian use, with such precision that it may be laid down on the map here." (Italics supplied.) (See finding 5, R. 34, 35.)

5. The detailed report of Gen. Palmer showed who had title. It was his official duty under his appointment by the President (acting under authority of the Act of July 31, 1854) to ascertain the location of the several tribes of Indians who occupied and held possession thereof and to secure the signatures of the bands and tribes of Indians whose title to the lands was to be extinguished. His report was a recognition of the aboriginal possession *as to Respondent tribes who are given judgment here* for he describes their lands. (Senate Document numbered 25, Fifty-third Congress, first session, pp. 22 to 32.) (Finding 5, R. 34-35.)

This was approved by the Commissioner of Indian

Affairs who under the law had the responsibility thereunder in the following language:

> "The extent of country *to which the Indian title is by these articles relinquished* is estimated at about 5,000,000 acres, and the extent of the reservation at 750,000 to 800,000 acres. The reserve, it will be observed, lies within the limits reserved from sale by order of the President of the 9th of November, A. D., 1855." (Senate Document numbered 25, Fifty-third Congress, first session, p. 8.)

It was approved by the Secretary of the Interior and by the President when he sent it to the Senate with the treaty for consent to its ratification (R. 33).

6. There was also the *payment of earnest money*, under direction of Congress in keeping with the terms of the treaty. (Article 3 of the unratified treaty, R. 10.)

7. Annual Reports of the Commissioner of Indian Affairs officially communicated by the Secretary of Interior to Congress show many recognitions of the Indian title to the lands which the Court's opinion held belonged to Respondent Indian tribes. Some of these quotations from these annual reports are from the Superintendent of Indian Affairs, some from U. S. Indian Agents and some are the Commissioner's own language. We shall give only a few dates and quotations:

1863

> "• • • The Indians relying upon the promises made by the former Superintendent Palmer by whom the treaty was negotiated promptly removed to the stipulated reservation without awaiting the ratification of the treaty. They now complain and justly, that they have sold *all their former possessions which have been taken possession of by the whites* and that they have realized none of the benefit which they were assured would result from the treaty. • • •
>
> "• • • But as the Senate failed to ratify the treaty *the title to the whole territory above specified is still*

vested in the Indians, the white settlers thereon are but trespassers upon Indian lands" (Annual Rep. p. 9).

1862

"• • • They say 'they made a treaty with the government, *sold their lands, abandoned their country,* and in compliance with the stipulations of said treaty they removed to this reservation where they had continued to live and in doing so have fulfilled their part of the agreement but not so the government. On the contrary it never has ratified the treaty and has done nothing but pay them in promises for the land abandoned. This treaty they say was made many years ago and they have waited patiently for their Great Father to fulfill his promises but they cannot wait much longer.' *"I have done and said everything in my power to convince them that the government will yet fulfil its promises and act in good faith but all to no purpose"* (Annual Rep. p. 60).

1864

"• • • They abandoned large tracts of land to the United States, now occupied by the whites, and promptly removed upon the reserve proposed for their residence, and have since continued to reside upon it. • • •"

"• • • *They were induced to remove to the reservation by late Superintendent Joel Palmer in 1855 and a treaty for the purchase of their lands concluded.* The senate failed to ratify the treaty and they have consequently never received anything under it. But their part of the stipulation have all been complied with. *They gave up their lands* and they have since been occupied by whites. • • •" (Italics supplied.)

"• • • They have waited anxiously for ten years for the fulfilment of the promises made to them *when they surrendered their lands to the United States"* (Annual Rep. p. 11).

1867

"• • • *They then ceded their lands* and removed to the Coast reservation, (Siletz agency,) expecting that

the government would fulfil its part in carrying into effect the stipulations of that treaty; but in this they have been greatly disappointed. * * *"

"* * * By the terms of the treaty *the Indians ceded all their lands,* and agreed to remove to the coast reservation; in consideration the government promised to pay certain annuities, to build mills, provide schools, physicians, open farms, erect buildings, &c. This treaty the Senate refused to ratify, and it has therefore not been held to be binding upon the United States; but the Indians fully complied with the terms of their side of the treaty, abandoned their lands, removed to the reservation designated for them, and have, with few exceptions, remained there since. White settlers occupied their lands, and still occupy them. The Indians complain, and justly I think, that having complied with their side of the treaty, we ought to comply with ours * * *" (Annual Rep. p. 7).

1871

"As an officer of the United States Indian Department, I demand, in behalf of the Indians of Oregon, that their rights be regarded, and justice done them in some way, either by paying them *for their lands,* or allowing them to locate homes in common with the white men, who are making the Indian country so valuable. This subject is one that concerns the welfare of thousands of white people settled on the lands still claimed by these Indians. The importance of prompt action is manifest, when it is known that some of them have already taken council of able lawyers, who give them encouragement to prosecute their claims. * * *" (Annual Rep. p. 721). (All italics supplied.) (See Finding 12, p. 40, second par.)

These are documents of which this Court takes judicial notice. They were introduced as a chain in the proof of occupancy. However, they also show recognition of the most definite kind.

They constitute abundant recognition of the Indians' title to the lands from which they had been dispossessed

and as was said about similar reports in a case in the Supreme Court, "these reports were officially communicated by the Secretary of the Interior to Congress and there is nothing to show any disapproval. * * *" *Donnelly* v. *U. S.*, 228 U. S. 243 at 258, 57 L. Ed. 820 at 826.

Conclusion

Respondents had the original Indian title "as sacred and as securely safeguarded as is a fee simple absolute title." This was shown when the proof was made of their aboriginal possession and occupancy. Recognition though not necessary has been shown. That the Government took it for its own public use without compensation is admitted. Respondents lacked only the authority to sue the Government. This the jurisdictional act gave in unequivocal language.

We respectfully submit that the judgment should be affirmed.

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December, 1945.

FILE COPY

DEC 23 1945
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387

UNITED STATES OF AMERICA,
Petitioner,
vs.
ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents.

APPENDIX TO BRIEF FOR RESPONDENTS CONTAINING FINDINGS DIRECTLY BEARING ON QUESTION PRESENTED AND ACTS OF CONGRESS REFERRED TO IN BRIEF.

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INDEX TO APPENDIX

	Page
Jurisdictional Act	1
Selected findings directly bearing on questions presented	4
An Act to Establish Territorial Government of Oregon, 9 Stat. 323	17
An Act Authorizing Negotiation of Treaties with the Indian Tribes in Oregon and for Extinguishment of Their Claims, 9 Stat. 437	18
Ordinance of 1787 Establishing Northwest Territory Made Applicable to Oregon Territory by Act Creating that Territory	20

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JURISDICTIONAL ACT

(Public—No. 332-74th Congress)

(S. 2761)

An Act

Conferring jurisdiction upon the Court of Claims to hear and determine claims of certain bands or tribes of Indians residing in the State of Oregon.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of

the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143) and December 21, 1855 (12 Stat. 981), may have against the United States; and (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; and any payment which may have been made under any claim or agreement shall not operate as an estoppel but may be pleaded as a set-off, and the United States shall be allowed to plead, and shall receive credit for all sums including gratuities, paid to or expended for the benefit of the respective tribes or bands of Indians, but no expenditures for the benefit of these Indians made out of appropriations authorized by the Act of June 18, 1934 (48 Stat. L. 984), shall be considered as offsets. The claim or claims

of each tribe or band may be presented separately or jointly by petition, subject, however, to amendment and consolidation in proper cases. Such action or actions shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any nation, tribe or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court.

The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act.

Official letters, papers, documents and public records, or certified copies thereof, may be used in evidence and the departments of the Government shall allow the attorney or attorneys access to such treaties, papers, correspondence, or records as may be needed by said attorney or attorneys.

Sec. 3. That upon the final determination of such suit, or suits, the Court of Claims shall decree such fees not exceeding 10 per centum of the amounts recovered as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, together with all necessary and proper expenditures incurred in the preparation and prosecution of the suit or suits.

Sec. 4. The proceeds of all amounts, if any, recovered for said Indians, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled therefor and shall draw interest at the rate of 4 per centum per annum from the date of the original judgment or decree and thereafter shall be subject to appropriation by Congress.

Approved, August 26, 1935.

Selected Findings Directly Bearing on Question Presented

"Special Findings of Fact (R. 23)

1. Clause (b) of the special jurisdictional act under which this suit was brought confers upon this court jurisdiction to hear, adjudicate, and render final judgment in and upon 'any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described' in the unratified treaty of August 11, 1855, 'at and long prior to the dates thereof.' Certain tribes, which also signed this unratified treaty of 1855, but which are not parties to this suit, were expressly excluded by the jurisdictional act because separate provisions had been made by Congress with respect to their claims. The Indians so excluded were the Coos Bay, Lower Umpqua, and Siuslaw tribes (R. 23).

* * * * * * *

2. March 3, 1847 (9 Stat. 203), Congress passed an act to amend the act of June 30, 1834 (4 Stat. 735), 'for the organization of the Department of Indian Affairs,' and to amend an act of the same date (4 Stat. 729) 'to regulate trade and intercourse with the Indian tribes,' in section 1 of which act of 1847 it was provided 'That the limits of each superintendency, agency, and subagency shall be established by the Secretary of War, either by tribes or geographical boundaries; and the superintendents, agents, and subagents shall be furnished with offices for the transaction of the public business, and the agents and subagents with houses for their residences, at the expense of the United States * * *.' By the act of August 14, 1848 (9 Stat. 323) Congress created the territory of Oregon, within the area of which lived various Indian tribes in addition to plaintiff tribes and bands, and there was inserted in sec. 1 of that act the provision that nothing therein contained 'shall be construed to impair the rights of person or property not pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty

between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed.' This provision was made applicable to all territories and territorial governments which embraced Indians (R. S. 1839, 1840).

June 5, 1850 (9 Stat. 437), Congress passed an act entitled 'An act authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for other purposes.' Sec. 1 of this act authorized the President to appoint one or more commissioners to negotiate treaties with the several tribes for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if practicable, for their removal east of said mountains. The President was also directed to obtain their assent and submission 'to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories * * *.' Sec. 2 authorized the appointment, by and with the advice and consent of the Senate, of a superintendent of Indian Affairs for the Territory of Oregon to exercise a general superintendence over all Indians in Oregon and to exercise and perform all powers and duties assigned by law to other Indian superintendents. Sec. 4 authorized the President, by and with the advice and consent of the Senate, to appoint one or more Indian agents, not exceeding three, to perform all the duties as its agent to such tribe or tribes as should be assigned to him by the superintendent at the direction of the President. Sec. 5 provided 'That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon.' Sec. 6 appropriated $25,000 to carry into effect the provisions of the act. Subsequent appropriations were made from time to time to carry out the provisions of the act and, also, for expenses of negotiating and making treaties with the Oregon Indians for extinguishment of their claims to lands.

The superintendent and agents were forthwith appointed. Anson Dart was appointed Indian superintendent and was later succeeded by General Joel Palmer. Thereafter, under authority, direction, and instructions of the Congress and the President, Dart and Palmer negotiated various treaties in 1851 and subsequently with various tribes and bands of Indians in Oregon, including the unratified treaty of August 11, 1855 made by General Palmer with certain of plaintiff tribes and bands for extinguishment of original Indian title to lands claimed and occupied by them. The Indian tribes, parties to this treaty of 1855, were the tribes and bands of Tillamooks, the Sinslaw or Siuslaw, the Umpqua, the Kowes Bay or Coos Bay, the Coquille or Nas-o-mah, the Too-too-to-ney, and the Chetco.

Prior to the negotiation and signing of the treaty of August 11, 1855, nineteen separate treaties had been negotiated and made in 1851 with various tribes and bands of Indians, including the Tillamook (North), not plaintiff Tillamooks tribe; the Clatsop (plaintiff herein); the Ne-ha-lum (plaintiff herein), and various bands of the Chinook tribe (also a plaintiff herein).

Six other treaties were negotiated, made, and signed in 1853, 1854 and 1855 by Commissioner Anson Dart or by Gen. Palmer, assisted by the Indian agents, with the various tribes and bands named therein, for extinguishment of Indian claims of original Indian titles. These six treaties referred to in clause (a) of the jurisdictional act were ratified. None of the claims made in this suit is directly based on those treaties.

The unratified treaty of August 11, 1855, with which we are here concerned and which, as hereinafter stated, was not submitted to the Senate until February 11, 1857, was not rejected by the Senate but was simply not reported out by the Committee on Indian Affairs to which it had been referred. Apparently the reason this treaty of August 11, 1855, and certain treaties made with various tribes and bands in 1851 were not reported out by the Senate Committee for action by the Senate was because the August 11, 1855, treaty described the land to be ceded as overlapping at the north portion certain lands claimed by the North Tillamooks, Chinook, Clatsop, and

Ne-ha-lum tribes who did not sign the 1855 treaty and with whom a separate treaty in 1851 had been negotiated and signed; and, also, because certain other treaties negotiated and signed in 1851 with certain other tribes and bands were in effect superseded by subsequent treaties made with some of the same tribes and bands in 1853, 1854, and 1855, which subsequent treaties had been ratified (R. 23-27).

* * * * * * * *

3. Congress enacted provisions from time to time and made various appropriations to carry out and fulfill ratified treaties made by Anson Dart, Gen. Palmer, and others with various tribes of Oregon Indians (some of whom are plaintiffs herein) for the extinguishment by cession to the United States of their claims of original use and occupancy title to lands.

* * * * * * *

None of the unratified treaties mentioned in finding 2, made in 1851, including those made in that year with the seven bands and tribes who were paid in full, as above-mentioned, and none of the above-mentioned six ratified treaties included, as ceded land, any of the land for which compensation is claimed in the petition herein by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos.

All the above-mentioned ratified treaties except the sixth had been made and ratified before the treaty of August 11, 1855, with which we are here concerned, was transmitted by the President to the Senate and before the President issued the Executive Order of November 9, 1855, hereinafter mentioned, conditionally creating the Coast Reservation in part out of certain lands involved in this case and ceded under the August 11, 1855 unratified treaty. The reservation was created, subject to future curtailment if the President should deem proper, for the Indian tribes and bands party to the 1855 treaty and other tribes and bands which the President might place upon said reservation.

As hereinafter mentioned, it appears that some of the Indians of some of the above-mentioned tribes and bands

whose treaties were ratified were subsequently removed to and placed upon the reservation described in the Executive Order of November 9, 1855, notwithstanding the treaty of August 11, 1855 with the Indians, who claimed and held original Indian title to such lands had not been ratified, and such original Indian title had not been legally extinguished.

Gen. Palmer, assisted by the Government Indian agents, made investigations and reports as to the lands and areas thereof claimed, occupied, and used by plaintiff tribes and bands of Tillamooks, Coquilles, Too-too-to-neys, and Chetcos, parties to the unratified treaty of August 11, 1855. Plaintiff tribes and bands, except those mentioned in finding 5, signed and accepted this treaty dated August 11, 1855 on August 11, August 17, August 23, August 30 and September 8, 1855; because of these different dates of signing by the different tribes, the jurisdictional act referred to the 1855 treaty as 'treaties.' So far as here material, the unratified treaty of August 11, 1855, was as follows:"

> (here follows a quotation of the unratified treaty by which the lands ceded, including the lands recovered herein, is set out a reservation for Respondents and others was provided and the usual annuity payments are stipulated) (R. 27-32).

"4. Plaintiff tribes and bands (except the plaintiffs Chinook, Clatsop, and the Ne-ha-lum tribes, the Confederated tribes of the Grand Ronde Community, Oregon, so-named, Willamette Valley Confederated tribes of Indians, so-named, and the Siletz Confederated tribes, so-named) were parties signatory to the unratified treaty above set out and signed by the chiefs and headsmen of the tribes and bands as set out therein, respectively. The treaty was signed by Joel Palmer, duly authorized by the President of the United States on behalf of the government of the United States. It was forwarded to the office of the Commissioner of Indian Affairs, Interior Department, by Superintendent Palmer on November 14, 1855, but was not transmitted by the Commissioner of Indian Affairs to the Secretary of the Interior for submission to the President until February 5, 1857. The reason for this delay from November 14, 1855,

to February 5, 1857, was that this treaty of August 11, 1855, with numerous other treaties negotiated and made with the various tribes and bands of Indians in Oregon, was received by the Commissioner of Indian Affairs during a recess of Congress—which treaties were afterwards withheld by the Commissioner of Indian Affairs because of the hostile condition of the Government's relation with certain Indians in that country, which, however, was not caused by plaintiff Indians. Due to the intrusion and conduct of certain white settlers, and the resentment thereof by certain Indians, there were open hostilities with the Rogue River Indians, a great many of whom were exterminated. A great many of the other Rogue River bands of Indians were driven from their homes into the mountains, but after hostilities ceased they were rounded up and permanently placed upon the Coast Reservation, hereinafter mentioned, created in part out of the land claimed by plaintiff Tillamooks tribe. A [illegible] of these Rogue River Indians died of disease contracted from exposure during this period. When various other treaties which had been negotiated, made, and executed by Anson Dart, Gen. Palmer, and others with various tribes and bands of Indians were finally sent by the Commissioner of Indian Affairs to the Secretary of the Interior, and, by him, to the President, who transmitted them to the Senate for ratification, the treaty of August 11, 1855 with certain plaintiff tribes and bands was accidentally and unintentionally overlooked and not sent along with the other treaties. Some of the treaties transmitted at that time for ratification appear to have been those made in 1853, 1854, and 1855, mentioned in clause (a) of the jurisdictional act, certain of which tied in with the Coast Reservation defined and sought to be created by art. 1 of the unratified treaty with certain plaintiff bands and tribes of August 11, 1855, and as described in the Executive Order of November 9, 1855, hereinafter referred to.

The 1855 treaty and the original papers, including the instructions to and the reports from Gen. Palmer as appear from the Journal of the Senate, were sent to the Senate by the President February 11, 1857; on February 18 the treaty was read and referred to the Committee on Indian Affairs. The treaty was not reported out by the

committee and Congress adjourned shortly after the treaty was submitted; it was never acted upon by the Senate, as shown by Senate Executive Document No. 25, 53rd Cong., 1st sess., referred to in clause (b) of the jurisdictional act herein.

At the next session of Congress this treaty of August 11, 1855, and certain other treaties which had been negotiated and made in 1851, were not reported by the Indian Affairs' Committee to the Senate for consideration, apparently for the reasons hereinbefore mentioned, and these treaties were never thereafter acted upon by the Senate (R. 32-34).

5. Prior to execution of the treaty of 1855, and after Joel Palmer became superintendent of Indian Affairs in Oregon, he was duly authorized and directed by the President to draft and negotiate treaties for the purpose of extinguishing the Indian title to lands in Oregon Territory, including the lands described in the unratified treaty of 1855, with certain of plaintiff tribes and bands. Palmer was notified of his appointment by the Commissioner of Indian Affairs August 12, 1854, and in the performance of such duties and functions, and by direction of the President, through the Bureau of Indian Affairs, it became and was his duty to investigate and ascertain the location of the several Indian tribes and bands who occupied and held possession of lands, the areas thereof and the nature and extent of such occupancy and use, and to secure the signatures of the tribes and bands of Indians who owned and occupied the lands and held the original Indian title sought to be extinguished. This he did with care and thoroughness.

In the notice of his appointment, transmitted by the Commissioner of Indian Affairs, Gen. Palmer was advised that 'You will furnish me with a skeleton map of Oregon Territory showing the location of the different tribes, with the extent of territory claimed by each and the nature or tenure of the claim and as treaties are made designate the reserve provided for Indian use with such precision that it may be laid down on the map here."

In further carrying out his instructions and duties Palmer made an extended trip, or trips, over the land de-

scribed in the treaty of August 11, 1855, assisted by Oris Taylor and J. L. Parrish, Indian Agent, Port Orford District, and thus obtained the added store of information required by the Bureau of Indian Affairs. The Port Orford District, of which J. L. Parrish was the duly appointed Indian Agent, was located on the coast of southern Oregon in the area of the lands occupied and held by the Indians of the Coquille, the Too-too-to-ney, and the Chetco tribes. Gen. Palmer accumulated and submitted detailed data of the geographical location and names of the tribes and bands; and submitted definite boundaries of the lands of plaintiff tribes and bands of the Tillamooks, Too-too-to-neys, Coquilles and Chetcos who were parties to the treaty of August 11, 1855, in the form of a written report to the Commissioner of Indian Affairs, accompanied with a detailed report from J. L. Parrish, Indian agent, in which was set out the location of the various tribes and bands of Indians.

The Too-too-to-ney, the Chetco, and the Coquille tribes are described in the Palmer report as occupying 'That part of Oregon south of the waters of Coos Bay and west of the Summit of the Coast Range of Mountains.'

The Palmer report further stated:

> A detailed statement of Indian affairs in the Port Orford district will be found in the accompanying report of Agent Parrish. He enumerates twelve distinct bands, with an aggregate population of 1,311 souls, and includes them all in the Too-ton-ton (Too-too-to-ney) tribe. These bands, however, speak at least four distinct languages, and but few in each band can converse with those of another. Those grouped as one band often reside in several villages. These bands are scattered over a great extent of country—along the coast and along the streams from the California line to 20 miles north of the Coquille (region), and from the ocean to the summit of the Coast Range of mountains. I visited several bands in person, and directed Mr. Taylor to accompany and assist the agent (Parrish) in ascertaining the numbers of the remainder. Excepting the Chetcas (Chetcos) and Coquilles, I found these

Indians at peace with the whites and among themselves. They are willing the whites should occupy their lands, provided they are permitted to retain their fisheries, from which they mainly derive their subsistence.

The territory of plaintiff bands of Tillamooks is set out in the Palmer report as 'The country along the coast from Umpqua River to the Ne-a-ches-na (river), a distance of about 120 miles, is occupied by five bands of the Tillamook(s) tribe' (R. 34-35).

6. Plaintiffs, the Tillamook, Coquille, Too-too-to-neys, and Chetco tribes and bands, parties to the unratified treaty of August 11, 1855, had exclusively occupied, held, and used from time immemorial (as shown by the proof from as early as 1750) that part of the lands embraced and described in the unratified treaty of 1855, as hereinafter particularly described, lying south of the north line of the Coast Reservation, mentioned as a reserve for the Indians in the unratified treaty of August 11, 1855, and described in a subsequent Executive order of November 9, 1855. The plaintiff tribes and bands above-mentioned in this finding had immemorially, and long prior to the date of the unratified treaty of August 11, 1855, held original Indian title, claim and rights to, in, and upon the lands and appurtenances thereon within the boundaries as are hereinafter in findings 8, 9, and 10 specifically described and set forth (R. 35-36).

7. The four bands of plaintiff Tillamooks tribe which lived south of Cape Lookout and the north line of the reservation described in the treaty were designated in the treaty as bands of Tillamooks, and signed such treaty without further designation. However, the four bands constituted a tribe all speaking the same language. They were sometimes called the Yacons or Southern Tillamooks, and they held and occupied the contiguous lands, as hereinafter described in finding 8.

The Coquille tribe of Indians was composed of bands as set out in the caption of the petition herein and in the treaty of 1855. These bands of Coquille Indians were designated

as a tribe by the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Too-too-to-ney tribe of Indians was composed of bands as set out in the caption hereof, and were so designated in the language of the treaty of August 11, 1855, preceding the signatures of their chiefs and headmen.

The Chetco tribe was at all times considered as a part of the Too-too-to-ney tribe, but there was a slight difference in the language of the two tribes. They were designated in the report of Gen. Palmer as the Too-too-to-neys, referred to in the treaty as the 'Chetco tribe', and, although signing the treaty in the column with the Too-too-to-ney bands, signed the treaty as 'Chetco Tribe.' This tribe occupied the tract of land which was contiguous to the lands of the Too-too-to-ney tribe, as hereinafter described and set forth (R. 36).

8. The bands of plaintiff Tillamooks tribe, the bands of the Coquille tribe, and the bands of the Too-too-to-ney tribe, including the Chetco tribe, are sometimes, for convenience, referred to hereinafter as the Tillamooks, Coquilles, Too-too-to-neys, and the Chetcos, respectively. The land so exclusively occupied, held, and used by plaintiff bands of Tillamooks, and to which they held and owned the original title, claim and right, is described as follows:"

(here follows description of lands of Tillamooks) (R. 37).

"9. The lands so exclusively occupied, held and used by the Too-too-to-neys, including the Chetco tribe, are described as follows:"

(here follows description of lands of Too-too-to-neys and Chetco) (R. 37-38).

"10. The land so exclusively occupied, held and used by the Coquilles is described as follows:"

(here follows description of lands of Coquilles) (R. 38-39).

"11. The Indian tribes and bands above-mentioned occupied more or less accurately described areas of land with

clearly defined boundaries, and lived principally along rivers and creek banks bearing the same name as the tribe living along its banks. Generally, they appear to have taken their tribal designations from, or to have been given the names of certain streams along which they lived, or the streams were named for the Indian tribes.

The above-described lands which were ceded, including a portion of the total area which was designated by the unratified treaty of August 11, 1855, as a residence for Indians, were in the exclusive possession and use of plaintiffs Tillamooks, Too-too-to-ney, Coquille, and the Chetco bands and tribes, parties to this unratified treaty (R. 39).

12. Plaintiffs Tillamooks, Too-too-to-ney, Chetco, and Coquille bands and tribes gave up their original Indian title to their lands in accordance with the conditional promises made by them in the unratified treaty of 1855 and went upon or were removed by the Government to the area mentioned in the treaty as a residence, described as a conditional reservation by the Executive Order of November 9, 1855, and later known as the Coast Reservation. This reservation, as described in the unratified treaty, and which was approximately that described in the Executive Order of November 9, was composed in part of a portion of the lands exclusively used, held and occupied under original Indian title by the plaintiff bands of Indians composing the Tillamooks tribe. A part of the reservation at its south end appears to have included some of the lands claimed by the Coos Bay, Umpqua, or Siuslaw tribes.

This reservation was later reduced or diminished, as hereinafter mentioned, by an Executive Order of December 21, 1865, and, further, by acts of Congress of March 3, 1875, 18 Stat. 420, 446, and May 13, 1910, 36 Stat. 367.

The Tillamook, Too-too-to-ney, Chetco, and Coquille bands and tribes, plaintiffs herein, have never received any compensation for the lands to which they had original Indian title, hereinbefore mentioned in findings 8, 9, and 10, or the lands taken from the reservation and restored to the public domain by reduction of the Coast or Siletz Reservation by Executive Order of 1865 and the act of Congress of 1875, except to the extent that the Indians of the Tilla-

mook, Too-too-to-ney, Coquille, and Chetco tribes benefited with respect to land to which the Tillamooks had original Indian title under the allotment act of February 8, 1887 (24 Stat. 388), the agreement of October 31, 1892 (28 Stat. 286, 323), the act of May 31, 1900 (31 Stat. 221, 223), and the act of May 18, 1916 (39 Stat. 123, 149).

Protests of the failure of the United States to ratify the treaty of August 11, 1855, were continuously made by the Indian tribes and bands, parties thereto, by the Government's Indian superintendents and agents and the Commissioner of Indian Affairs in his annual reports, in practically all reports up to and including 1869, and such protests continued thereafter at various times until the jurisdictional act herein was enacted (R. 39-40).

* * * * * * *

16. The boundaries particularly set forth in finding 14, which were those designated in the Executive Order of November 9, were approximately those of the reservation set out in the unratified treaty of August 11, 1855. Congress acquiesced in and ratified the Executive Order of November 9, 1855, as only conditionally withdrawing the land from public settlement by the passage of the act of March 3, 1875 (18 Stat. 420, 446), hereinafter referred to (R. 48).

17. The land to which plaintiff Tillamooks tribe owned and held original Indian title as hereinbefore described, and as approximately indicated on the above sketch, lay for the most part within the confines of the original Coast Reservation, and such land of this tribe as was within such reservation was taken on November 9, 1855, in part by defendant from the Tillamook tribe for the benefit of other tribes and bands and in part for the benefit of the United States as and when it might desire to use it for public purposes, by virtue of the Executive Order of November 9, 1855, ratified by Congress. The land of the Tillamook tribe, as hereinbefore described in finding 8, as lay outside the boundaries of said Coast Reservation was taken by defendant from said Tillamooks on November 9, 1855, or soon thereafter, as were the lands of the Coquille, Too-too-to-ney,

and the Chetco tribes when these four tribes were moved off their lands in 1855, at or about the date of the Executive Order of November 9 creating the Coast Reservation described therein (R. 49).

18. The land of plaintiff Tillamooks tribe outside the Coast Reservation and all the lands of the Coquille, Too-too-to-ney, and Chetco tribes were taken by inducing and coercing the Indians of these tribes to move from their lands, to which they held original Indian use and occupancy title, to the Coast Reservation upon the promise that the treaty of August 11, 1855, would be ratified and the terms thereof carried out by the United States—which was not done.

The lands formerly held and occupied by plaintiffs Tillamooks, Coquille, Too-too-to-ney, and the Chetco tribes, exclusive of the portion of land of the Tillamooks included in the Coast Reservation, were immediately opened to homestead entry and settlement as public lands of the United States, which action was known to, acquiesced in, and subsequently ratified by Congress; the lands originally within the reservation under the unratified treaty and the Executive Order of November 9, 1855, which were later excluded by the Executive Order of December 21, 1865, and the act of Congress of March 3, 1875, were disposed of as public lands immediately upon the taking effect of such Executive Order and statute (R. 49).

19. After the treaty of August 11, 1855, had been signed by Gen. Palmer on behalf of the United States and by the chiefs and headmen of the Indian tribes and bands, parties thereto, and without awaiting ratification thereof, the United States dispossessed the Indians of the Coquille, Too-too-to-ney, and Chetco tribes, and in part the Tillamooks, all parties to the treaty, of their lands, and without the consent of the Indian tribes mentioned and against their will, independently of the conditional consent expressed by them in the unratified treaty of August 11, 1855, and without compensation then or later, and appropriated such lands for the use and benefit of the United States (R. 49-50).

20. Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation (R. 50).

• • • • • • •

34. The particular lands for which claim for compensation is made in the petition herein, and as hereinbefore described and to which plaintiffs Tillamooks, Coquille, Too-too-to-ney, and the Chetco tribes held and owned the original Indian title through exclusive use and occupancy from time immemorial, were taken by the United States for a public purpose on or ~~shortly~~ after November 9, 1855, without payment of just compensation (R. 58).

• • • • • • •

An Act to Establish Territorial Government of Oregon, 9 Stat. 323

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, all that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon: *Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed; • • •

• • • • • • •

SEC. 14. *And be it further enacted, That the inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory,* on the thirteen day of July, seventeen hundred and eighty-seven; and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory; and the existing laws now in force in the Territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the constitution of the United States, and the principles and provisions of this act; subject, nevertheless, to be altered, modified, or repealed, by the legislative assembly of the said Territory of Oregon; but all laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void; and the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same, or any provision thereof, may be applicable (Act of August 14, 1848, 9 Stat. pp. 323, 329). (Italics supplied.)

An Act Authorizing the Negotiation of Treaties With the Indian Tribes in the Territory of Oregon, for the Extinguishment of Their Claims to Lands Lying West of the Cascade Mountains, and for Other Purposes—Act of June 5, 1850.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be authorized to appoint one or more commissioners *to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains;* and, if found expedient and practicable, for their removal east of said mountains; also, for obtaining their

assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories of the United States, so far as they may be applicable to the tribes in the said Territory of Oregon; the compensation to such commissioner or commissioners not to exceed the rate heretofore allowed for similar services.

Sec. 2. *And be it further enacted,* That the President be authorized, by and with the advice and consent of the Senate, to appoint a Superintendent of Indian Affairs for the Territory of Oregon, who shall receive an annual salary of twenty-five hundred dollars, and whose duty it shall be to exercise a general superintendence over all the Indian tribes in Oregon, and to exercise and perform all the powers and duties assigned by law to other superintendents of Indian affairs.

Sec. 3. *And be it further enacted,* That so much of the act to establish the territorial government of Oregon, approved the eleventh (14th) August, 1848, as requires the governor of said Territory to perform the duties of Superintendent of Indian Affairs, and authorizes him to receive a salary therefor, in addition to the salary allowed for his services as governor, be repealed; and that the governor of said Territory shall hereafter receive an annual salary of three thousand dollars.

Sec. 4. *And be it further enacted,* That the President be authorized, by and with the advice and consent of the Senate, to appoint one or more Indian agents, not exceeding three, as he shall deem expedient, each of whom shall receive an annual salary of fifteen hundred dollars, give bond as now required by law, and perform all the duties of agent to such tribe or tribes of Indians in the Territory of Oregon as shall be assigned to him by the superintendent to be appointed by the provisions of this act, under the direction of the President.

Sec. 5. *And be it further enacted, That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon.*

Sec. 6. *And be it further enacted*, That the sum of twenty-five thousand dollars be appropriated, out of any moneys in the treasury not otherwise appropriated, to carry into effect the provisions of this act.

Approved, June 5, 1850. (Act of June 5, 1850, 9 Stat. p. 437.) (Italics supplied.)

Ordinance of 1787 Establishing the Northwest Territory Made Applicable to Oregon Territory by Act Creating That Territory.

Sec. 14. It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of compact between the original States and the people and states in said territory and forever remain unalterable, unless by common consent, to-wit:

Article I

No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Article II

The inhabitants of the said territory shall always be entitled to the benefits of writs of *habeas corpus*, and of the trial by jury of a proportionate representation in the legislature, and of judicial proceeding according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land, *and should the public exigencies make it necessary for the common preservation to take any person's property or to demand his particular services, full compensation shall be made for the same.* And, in the just preservation of rights and property it is understood and declared that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts, or engagements *bona fide*, and without fraud previously formed.

Article III

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. *The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress, but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.* (Italics supplied.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 26

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF OF ERNEST L. WILKINSON AND JOHN W. CRAGUN, AMICI CURIAE

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
Amici Curiae.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Summary of Argument	3
Argument	4
Conclusion	17

CITATIONS

Cases:

Assiniboine Indian Tribe v. *United States*, 292 U. S. 606	2
Boudinot v. *United States*, 18 C. Cls. 716, 728	6
Butler Lumber Co. v. *United States*, 73 C. Cls. 270, 285, 289, 292	6, 8, 9
Carroll v. *District of Columbia*, 22 C. Cls. 104	9
Colgate v. *United States*, 280 U. S. 43, 47-48, 49	2
Goltra v. *United States*, 91 C. Cls. 42	6
Harbor Springs v. *United States*, 72 C. Cls. 32	6
Howard v. *United States*, 101 C. Cls. 823	6
Hyde v. *United States*, 225 U. S. 347, 391	6
Indians of California v. *United States*, 98 C. Cls. 583, 599	6
Johnson v. *McIntosh*, 8 Wheat, 543, 574, 588	13, 16
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 565, 567-568	16
Mansfield v. *United States*, 89 C. Cls. 12, 22	6
Meagher v. *United States*, 86 C. Cls. 450	6
Melcher & Brinskelle v. *United States*, 101 C. Cls. 777	6
Minnesota v. *Hitchcock*, 185 U. S. 373, 388-389	9
Mitchell v. *United States*, 9 Pet. 711, 745	13
Northwestern Shoshones v. *United States*, 324, U. S. 335, 338-339	9
Radel Oyster Co. v. *United States*, 78 C. Cls. 816, 823, 824	6, 9
Robertson & Kirkham (1936), Jurisdiction Sup. Ct. U. S., § 219, p. 376, note 47	2
Shoshone Tribe of Indians v. *United States*, 324 U. S. 335, 337	2, 16

Page

Snare & Triest v. *United States*, 46 C. Cls. 109, 50 C. Cls. 201 6
Stanton & Jones v. *United States*, 68 C. Cls. 379, 389-390 7
Stubbs v. *United States*, 86 C. Cls. 152 6
Thebo v. *Choctaw Tribe of Indians* (C. C. A. 8 1895), 66 Fed. 372 16
United States, As Guardian v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 343, 345-346, 347 9, 10, 16, 17
United States v. *Brooks*, 10 How. 442, 459-460 9
United States v. *Creek Nation*, 295 U. S. 103, 110 17
United States v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123 17
United States v. *Esnault-Pelterie*, 299 U. S. 201, 202-3, and note 3 2
United States v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111 17
Walton v. *United States*, 24 C. Cls. 372, 376 6, 8
Worcester v. *Georgia*, 6 Pet. 515 11

Statutes:

Act August 7, 1789, 1 Stat. 50 12
Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. § 288 (b) 2
Act of August 26, 1935, c. 686, 49 Stat. 801, § 1 (b), R. 23 2, 3
Federal Tort Claims Act, § 401 of the Act of August 2, 1946, Pub. No. 601, c. 753, 79th Cong., 2nd Sess. 5
Indian Claims Commission Act Public No. 726; 79th Cong., 2nd Sess. 5

Miscellaneous:

American State Papers, Class II, Vol. I, 1789-1815, p. 8 11
Annual Report, Commissioner of Indian Affairs, Nov. 9, 1849 12
Colliers American Weekly of April 16, 1946, entitled "How We Bought America" 11
Fundamental Legal Conceptions (1923) pp. 36, 50 7
26 International Journal of Ethics, 92, 97, Roscoe Pound 7

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Opinion Below

The opinion of the Court of Claims (R. 61-83) is reported in 59 F. Supp. 934.

Jurisdiction

The judgment of the Court of Claims was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The petition

for a writ of certiorari was filed on August 31, 1945, and was granted on October 22, 1945 (R. 85). The jurisdiction of this Court is invoked under § 1 of the special jurisdictional act under which the case was instituted in the court below (Act of August 26, 1935, c. 686, 49 Stat. 801), and under the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. § 288 (b).

The special jurisdictional act provides that jurisdiction is conferred on the court below "with the right of appeal to the Supreme Court of the United States by either party, as in other cases," etc. Notwithstanding the special jurisdictional act was adopted subsequent to 1925,[1] certiorari and not appeal is the correct mode of review. *Shoshone Tribe of Indians* v. *United States*, 324 U. S. 335, 337; *cf.* Robertson & Kirkham (1936), *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47.

The judgment below is non-final, the court merely having found that respondents "are entitled to recover," but reserving "judgment as to the amount of recovery and the amount of offsets, if any, . . . for further proceedings." Jurisdiction rests on the Act of February 13, 1925, *supra*. *Shoshone Tribe of Indians* v. *United States*, 324 U. S. 335, 337. Therefore, the provisions of that act that this Court may review on certiorari "any case" in the Court of Claims —without any requirement that the judgment shall be final—invests this Court with jurisdiction. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-3, and note 3.

Questions Presented

Whether respondent Indian tribes have any legal and equitable claims arising under or growing out of their

[1] Compare, as to a situation where the special jurisdictional act was adopted before the Act of 1925 covering review by this Court, *Colgate* v. *United States*, 280 U. S. 43, 47-48, 49; *Assiniboine Indian Tribe* v. *United States*, 292 U. S. 606.

original title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by respondents, within the meaning of the special jurisdictional act in this case (Act of August 26, 1935, 49 Stat. 801, § 1[b], R. 23).

Statutes Involved

The statutes are set out in the findings and opinion of the Court of Claims (R. 23).

Statement

Each of respondent Indian tribes exclusively occupied, held, and used tracts of land in the State of Oregon from time immemorial (Finding 6, R. 35-36). The areas of land occupied by each of the tribes and bands were more or less accurately described with clearly defined boundaries, and were in the exclusive possession and use of respondents (Finding 11, R. 39).

The United States, under authority of Congress, treated with respondents for a surrender of a portion of their lands; but the treaties were never ratified (Finding 2, R. 23-27).

Respondents either went upon or were removed to lands which it had been agreed in the unratified treaties were to be retained by them as a reservation. This reservation, known as the Coast or Siletz Reservation, included lands occupied under original Indian title by part of respondent tribes. Part of this reservation has been taken from them, since they moved upon it, by Executive order and by statutes; but except for small benefits allowed respondents upon still other dispositions of their land in the Coast or Siletz Reservation, respondents never received any compensation for the taking of their Indian title to the lands in the unratified treaties that they had agreed to surrender, or which in the Coast or Siletz Reservation had been dis-

posed of without their consent (Finding 12, R. 39-40; see also Finding 34, R. 58).

The Court of Claims held (R. 70-77) that where the United States consents to be sued for a taking of original Indian title, to establish liability on behalf of the United States it is sufficient to show first that the Indians had an "original Indian title" and that that title was taken without their consent. It found the original title of the Indians by immemorial use and occupancy to be established as a matter of fact; that the United States subsequently took the same, and that the United States consented to be sued on such a title (as is provided in § 1 (b) of the jurisdictional act (R. 61-62)). It held that the liability of the United States therefore followed.

Summary of Argument

Now that Congress has permitted the United States to be sued for common law torts no one doubts that if the ingredients of a tort are proved, that liability will follow. By a parity of reasoning, now that Congress in the present case permits the United States to be sued for the taking of "Indian title" it should follow that if the taking of "Indian title" be proved liability should follow.

The contention of petitioner that the jurisdictional act only creates a forum does not reach the question at issue; namely, whether the taking of "Indian title" is a wrong to respondent, now that Congress has made it justiciable. The whole history of the United States shows that "Indian title" was a property right and that the taking of it did injure and was a wrong to respondents. Respondent has successfully proved loss of "Indian title" and is entitled to recover.

Argument

There is no statute which provides that a tort against an individual can not be committed by the United States.

And yet until a scant few weeks ago (Federal Tort Claims Act, § 401 of the Act of August 2, 1946, Pub. No. 601, c. 753, 79th Cong., 2nd Sess.), a citizen whose rights were tortiously invaded by the Government was without remedy—until and unless Congress passed a special jurisdictional act entitling him to sue in the Court of Claims. But now that the Government has consented to be sued it is liable to the same extent as an individual for any common-law tort committed by it.

The claim of an Indian tribe for the taking or destruction of its "Indian title" is an analogous case. One might as well argue that a citizen suffering damages through the tort of the agents of the United States in the prosecution of government business had no right to be free of such interference, as to argue that the Indian tribes of the United States had no rights whatever in their homes and property, simply because no treaty or statute provided against interference with the specific property of the particular Indian tribe. The argument of appellant that although under their original title Indians could continue to occupy their lands and be protected therein by the Government from any invasion of their rights and from dispossession by private parties, the United States could nevertheless at any time and upon any occasion terminate the Indian right of occupancy by a confiscation of Indian lands, and that a jurisdictional act permitting respondents to bring suit for the taking of such original Indian title did not contemplate an adjudication of liability against the United States, even upon findings of fact by the court that the petitioners held such original Indian title and that it had been confiscated by the government, is entirely unsound.

That argument follows the identical pattern which the Government has urged for a generation in the Court of Claims in attempting to defeat claims brought under spe-

cial jurisdictional acts—namely, that without the jurisdictional act no "liability" could be fastened on the United States; that the jurisdictional act makes no admission of "liability"; and that it consequently follows that the government cannot be held liable even though its negligence is proved and damages have been suffered. But this argument has been just as consistently rejected. The Court of Claims has found no difficulty in holding the United States to the same standard of legal responsibility as would be held in the case of a defendant which did not have sovereign immunity from suit. *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 285, 289, 292; *Walton* v. *United States*, 24 C. Cls. 372, 376; *Snare & Triest* v. *United States*, 46 C. Cls. 109, 50 C. Cls. 201; *Boudinot* v. *United States*, 18 C. Cls. 716, 728; *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 823; *Stubbs* v. *United States*, 86 C. Cls. 152; *Meagher* v. *United States*, 86 C. Cls. 450; *Goltra* v. *United States*, 91 C. Cls. 42; *Indians of California* v. *United States*, 98 C. Cls. 583, 599; *Melcher & Brinskelle* v. *United States*, 101 C. Cls. 777; *Howard* v. *United States*, 101 C. Cls. 823; *Mansfield* v. *United States*, 89 C. Cls. 12, 22: Cf. *Harbor Springs* v. *United States*, 72 C. Cls. 32.

The fallacy of the contention advanced by petitioner in this case and in the tort cases referred to revolves about what Mr. Justice Holmes called the "encysting of ideas" in phrases which "thereafter for a long time cease to provoke further analysis". *Hyde* v. *United States*, 225 U. S. 347, 391. The word "liability" is used in the cases stating that the special jurisdictional act does not "admit liability" in an entirely different sense from that in which it is used in, for instance, *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 824, where it was said as to the jurisdictional act there involved, "The intention of the Congress was to create a liability where heretofore there was no liability in this par-

ticular case." Confusion in the statement of the doctrine and wide misunderstanding of the statements of the courts might have been averted if some more analytical regard had been had for the content of such words as "rights" and "liabilities." The content of such words has been the subject of legal philosophical dissertation over a great part of our legal history; and a rather clear chart for the use of such words—or at least the analysis of the legal relationships which are involved in the use of the words—was years ago set forth by Professor Hohfeld. HOHFELD, *Fundamental Legal Conceptions* (1923), pp. 36, 50, *et passim.* Walter Wheeler Cook in his introduction to *Hohfeld, supra,* p. 9, refers to the fact that "the conceptions for which the terms 'liability' and 'disability' stand have been criticized by Dean Pound of the Harvard Law School as being quite 'without independent jural significance' "—citing Pound's discussion of *Legal Rights* in (1916) 26 International Journal of Ethics, 92, 97. In petitioner's argument in the present case, there is this same subtle shift in the meaning of the word "liability" between its use in the major and the minor premises of defendant's proposition.

In any of the cases in which it has been held that a jurisdictional act does not admit "liability" but merely provides a forum, it will be found that the contention of the plaintiff which the court was meeting was that the jurisdictional act established that the government must pay damages irrespective of the responsibility which an ordinary individual defendant might have in the circumstances, and that the only question which the jurisdictional act left open was how much the damages were. In this sense of the word, of course the jurisdictional acts did not admit "liability." A typical case is *Stanton & Jones* v. *United States,* 68 C. Cls. 379, 389-390, where the court notes that "The plaintiffs repeat a contention oftentimes made, that the only issue in the case,

made so by the special act, 'is the amount of such damages and losses.' * * * What the act provides is a forum to which the plaintiffs may resort, with the right to have the cause of action adjudicated and determined. We fail to discover in the language of the act an acknowledgment of liability; * * *."

The converse of this repeated contention of plaintiffs in the court below has been the opposite extreme adopted in the argument of petitioner in this case—that since no "liability" (in the sense of susceptibility to the entry of a judgment for damages) would exist apart from the special jurisdictional act, that no "liability" (in the sense of responsibility for its torts) could be found even after the passage of a jurisdictional act. As above noted, neither has this extreme been adopted by the court to which these special jurisdictional act cases are traditionally referred. See cases cited *ante*.

The clear effect of a jurisdictional act, as the court below has observed, is to subject the United States to the same possibilities of "liability" (in the sense of susceptibility to the entry of judgment against it) as in the case of an individual. That is to say, after the claimant proves in court that the conduct in question would constitute a tort for which an individual would be liable, then the United States admits "liability" (in any sense). But it is up to the claimant to prove his case against the government to the same degree as he would have to do in the case of a private individual—as to whom, of course, he could never establish a case merely by proving the quantum of his "damages" and without proving that "liability" (in the sense of responsibility) attaches. *Walton* v. *United States*, 24 C. Cls. 372, 376; *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 285, 289, 292.

A jurisdictional act must be construed to have this much effect or else it is a perfectly meaningless act on the part

of Congress, as the court below said in *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 824. If the jurisdictional act is not effective to permit adjudication of an action *ex delicto*, "the report of the committee in charge of the act clearly discloses that Congress was enacting legislation to no effect whatever." *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 292. And as the court said in *Carroll* v. *District of Columbia*, 22 C. Cls. 104, the jurisdictional act in such a view "is a barren right". In the present case, Congress well understood that it was conferring a jurisdiction broader than mere claims for taking an Indian title "recognized"[2] by treaty or the equivalent; for in clause (a) of the act it conferred that jurisdiction; consequently the further grant in clause (b) of jurisdiction respecting "original Indian title" can not be read as petitioner attempts to read it, or else Congress engaged in double talk and made a perfectly meaningless and hypocritical gesture in the so-called grant of jurisdiction. The argument of the first part of appellant's brief (Brief, p. 16)

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[2] "Recognized" Indian title, as used by petitioner and in earlier cases, is an inexact concept, referring varyingly to an outright treaty promise to respect the Indian title (so used in *Northwestern Shoshones* v. *United States*, 324 U. S. 335, 338-339), an executive acknowledgment that the particular Indians had an Indian title (that is, similar to "recognition" in the international-law sense, *United States* v. *Brooks*, 10 How. 442, 459-460), and the general acknowledgment of this government, which had also prevailed with all European discoverers of this country, that Indians in aboriginal use and occupancy of lands had a title to be respected (*United States As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345-346). Petitioner attempts, through the shifting concepts embodied in the word "recognized", to establish that lack of "recognition" in the contract or treaty sense establishes respondents' no-right in any sense. This Court has pointed out the barren effect of such epithetical denomination of Indian rights, notwithstanding which, the Court has said, "Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. * * * At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388-389.

that the jurisdictional act did not create liability but merely provided a forum does not reach the crux of this case for respondent does not contend that liability was established by the jurisdictional act per se. The question here is whether, the government having waived its political defense by making a deprivation of "Indian title" a justiciable controversy can now say that in taking such land no wrong was done to respondents, i. e., whether the taking of respondent's aboriginal home where they gained their livelihood, fought, loved, died, even as you and I, constituted a tort or injury to respondent.

Under the rule heretofore applied to jurisdictional acts—that they confer the same right to recover from the government that the person claiming to be wronged would have against an individual, the right of recovery is plain. No person other than petitioner would be permitted to divest respondents of their original Indian title. *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339. Petitioner concedes (Brf., p. 19) that "An Indian right of occupancy, whether or not formally recognized by the sovereign, has always been protected against the acts of private individuals, * * *." See also p. 20 of petitioner's brief.

The argument of petitioner (Brf., pp. 19-33) that respondents' original Indian title did not constitute a right of property against the sovereign and that no "liability" flowed from the invasion of respondents' title by the sovereign is a mere play on words and a perversion of historical fact.

If, as the appellant contends, Indians had no right, nothing to trade, nothing to sell, under their original title, it would seem to follow that the language of treaties providing for an exchange of lands was just so many words. The mere fact that only the sovereign could buy and that there

was no remedy for the Indians under the law if the government confiscated land held under original Indian title does not lead to the conclusion that the Indian had nothing, no rights of any value.

As stated in Cohen in his authoritative Handbook of Federal Indian Law, p. 321:

> "If title by aboriginal occupancy is simply equivalent to a tenancy at will, the land cannot be sold to the sovereign. Yet the practice of the United States and of the British Crown, before 1776 of purchasing land from the Indians, and the validity of conveyances thus effectuated has never been questioned. As Marshall, C. J. observed, when sovereigns claimed "the exclusive right to purchase" they "did not found that right on a denial of the right of the possessor to sell."
>
> *Worcester* v. *Georgia*, 6 Pet. 515.

Mr. Cohen, in effect, reiterated this statement of Indian right of property in a recent popular article in Colliers' American Weekly of January 19, 1946, entitled, "How We Bought the United States." Therein, he relates how we traditionally recognized the Indians' right of property in land under their right of immemorial use and occupancy, citing how Congress in 1794 agreed to pay the Iroquois $4,500.00 annually forever "in red calico and other goods" in exchange for their lands.

That the Indians themselves regarded their right of occupancy as a valuable property interest is obvious from the report of Secretary of War Knox to President George Washington as early as May 23, 1789 (American State Papers, Class II, Vol. I, 1789-1815, p. 8), which stated:

> "That it may be proper to observe that the Indians are greatly tenacious of their lands and generally do not relinquish their right, excepting on the principle of a specific consideration expressly given for the purchase of the same.

> "That the practice of the late English colonies and governors in purchasing Indian claims, has firmly established the habit in this respect."

The second statute respecting Indians enacted by the new Congress (Ordinance of 1787, Act August 7, 1789, 1 Stat. 50) also indicated a respect and recognition of Indian right of occupancy. Article three provided:

> "* * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property rights they shall never be invaded or disturbed."

With respect to the land of the very Indian tribe petitioning in this suit the Governor of Oregon, Joseph Love (Annual Report, Commissioner of Indian Affairs, Nov. 9, 1849) wrote the Secretary of State as follows:

> "As far as I have been able to see and converse with the Indians I find them friendly and well disposed. But many of them complain, they say the whites have settled their country, killed their game, brought among them sickness which has caused many deaths, that they are rapidly passing off; that the white people have promised them from year to year and from time to time that the United States Government would send out a governor * * * and commissioners to purchase their lands and pay for them. They are anxious to *sell* and the people are exceedingly sensitive on the subject. The exposure of families and property in the absence of male population makes it more desirable at this time than at any other since the settlement of the territory that they should *sell*." (Italics supplied.)

This report as to the respondent Indians leaves no doubt that it was the opinion of this tribe and the Government officials dealing with them that their aboriginal Indian title represented a property right even against the government.

It has been the consistent policy from the commencement of our government, as well as the policy of the European sovereignties which preceded that government, to consider the perpetual use and occupancy of the Indians as a "right" of the Indians. The "right" which the Indians lost to the sovereign upon discovery of this country was political sovereignty in the international sense—a very different matter from the "right" of the Indians to their peculiar land tenure. As Chief Justice Marshall said in *Johnson* v. *McIntosh*, 8 Wheat. 543, 574:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necesarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it*, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> "The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles." (Italics added.)

In *Mitchell* v. *United States*, 9 Pet. 711, 745, it is said:

> "• • • One uniform rule seems to have prevailed from their first settlement, as appears by their [British] laws; that friendly *Indians were protected in the*

possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent." (Italics added.)

The most recent official recognition of the traditional policy of this country, contrary to the contention of appellant, that Indian title is a property right, which this country has intended to respect, is found in the official statement issued by President Truman on August 13, 1946, when signing the Indian Claims Commisison Act, passed by the last Congress (Public No. 726; 79th Cong., 2nd Sess.). In referring to that measure, which inter alia grants jurisdiction to the newly created Commission to determine claims founded upon "the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of compensation agreed to by the claimant"[3] President Truman said:

"I am glad to sign my name to a measure (H. R. 4497) which removes a lingering discrimination against our

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[3] With respect to this grant of jurisdiction which was in the bill as it originally passed the House, but was struck by the Senate and reinserted by the Conferees, the Statement of the House Managers said:

"* * * the second of these classifications covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty. The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

First Americans and gives them the same opportunities that our laws extend to all other American citizens to vindicate their property rights and contracts in the courts against violations by the Federal Government itself.

"This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.

"I hope that this bill will mark the beginning of a new era for our Indian citizens. They have valiantly served on every battle front. They have proved by their loyalty the wisdom of a national policy built upon fair dealing. With the final settlement of all outstanding claims which this measure insures, Indians can take their place without special handicap or special advantage in the economic life of our nation and share fully in its progress."

Respondent's brief (p. 11) collects the many other cases asserting that original Indian title is really a title—that it establishes rights. The mere fact that the United States has the political power to extinguish these rights and refuses to redress the grievances thereby occurring does not prove that there is no right in the persons thus divested.

Until a jurisdictional act is passed, the Indians are wholly without remedy for this invasion of their property. If their property be taken by conquest, the courts of the conquerer can not weigh the political propriety of its government making the conquest. *Johnson* v. *McIntosh*, 8 Wheat. 543, 588. If the taking is by act of Congress or by Executive action or by simple failure to restrain the nationals of the acquiring power, the problem raised is still political.[4] No matter how plain the "recognition" (in any sense: see note 2, *ante* p. 9) of the rights of the Indians to their lands, or how solemnly it was contracted by the United States that those rights would not be invaded, still "the power has always been deemed a political one, not subject to be controlled by the judicial department of the government," and the courts are held without authority, absent a jurisdictional act, to interfere. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565, 567-568; *cf. United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347. In default of legislation authorizing suit, an Indian tribe cannot even sue or be sued by a private individual respecting its rights. *Thebo* v. *Choctaw Tribe of Indians* (C. C. A. 8th, 1895), 66 Fed. 372. The contractual ("recognized," in one sense of petitioner's use of the word, note 2, *ante*) nature of the rights is immaterial; the political department of the government alone determines all such matters—until a juris-

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[4] The brief of the appellant in stating that prior to the decision below no court has ever held the United States to be liable for the taking of land held under recognized, original Indian title (*Shoshone Indians* v. *United States*, 324 U. S. 335) failed to disclose, however, that the court recognized that jurisdictional acts had been enacted which provided for the adjudication of claims arising out of original Indian title as well as for adjudication of claims under treaties. The fact that the findings in previous cases did not permit recovery would appear to afford no basis for denying relief in a situation such as the present one where Congress again permitted suit on claims arising out of original Indian title and the findings of fact were such as to result in an adjudication of liability on the part of the United States.

dictional act is passed. It sues private individuals to vindicate the rights of the Indians, its wards. *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 343.

But once a jurisdictional act is passed authorizing suit, then if the Indians can prove their rights they are entitled to recover. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123. Here the Indians, upon the adoption of the jurisdictional act, were faced with the burden of establishing their original Indian title—their aboriginal right to their ancestral home. That presented "a question of fact to be determined as any other question of fact." *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345. That burden has been successfully borne; the fact has been established; and, in the light of the jurisdictional act, the political nature of the question no longer exists as a bar to recovery. Respondent's right to recover was properly found by the court below.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
Amici Curiae.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 26

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS

INDEX

	PAGE
Opinion Below	1
Preliminary Statement	1
The Issue	4
Summary of Argument	5
Argument:	
1. Liability of the United States for a taking of Indian lands is not dependent on whether the Indian claim or title had been previously recognized	6
2. Respondents' claims were recognized	8
3. In no event is dismissal of the suit warranted	10
Conclusion	11

CITATIONS

Cases:

Bridgeman v. *United States*, 140 Fed. 577 (1905)
Buttz v. *Northern Pacific*, 119 U. S. 55 (1886)
Clark v. *Smith*, 13 Pet. 195 (1839)
Fletcher v. *Peck*, 6 Cranch 87 (1810)
Johnson v. *McIntosh*, 8 Wheat. 542 (1823)
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Statutes:

Act of June 30, 1834, 4 Stat. 729
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Federal Tort Claims Act, Title IV of Public Law 601—79th Congress, Chapter 753—2nd Session, approved August 2, 1946
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Miscellaneous:

American Law Institute, Restatement, Trusts, Vol. 1, Sec. 208 (1)
Cohen: *Handbook of Federal Indian Law*, 1945, p. 83
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BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS

Opinion Below.

The opinion of the Court of Claims (Record, pages 61-83) is reported in 59 F. Supp. 934 (1945).

Preliminary Statement.

For more than two generations a number of Indian tribes in the State of Oregon have been seeking justice with little or no success. Their contention has consistently been that they were deprived of their homes and the lands claimed by them under their "original Indian title". During all of those years various Senators, Congressmen, Cabinet officers, Indian Commissioners, Superintendents and many others have interceded on behalf of these Indians, but ultimate frustration met every effort until 1935 when, for the

first time, Congress passed and President Roosevelt signed for them a jurisdictional Act which authorized the Court of Claims to "examine, adjudicate, and render final judgment" in respect of their claims. This was the first goal for which so many of them and their ancestors and others on their behalf had for so many years sought.

Eleven tribes joined in the suit which was filed in the Court of Claims. The latter, a body of vast experience in this field, heard many witnesses, examined voluminous evidence, both oral and documentary, and concluded that four of the eleven plaintiff tribes were entitled to recover. It held that under the 1935 jurisdictional Act they were entitled to fair compensation notwithstanding that their title had never been recorded or spelled out in a ratified treaty, but was, in the words of the jurisdictional Act, "original Indian title".

Looking back over the years that preceded this judicial determination, there is nothing to indicate any disposition on the part of Congress or the President or the Department of the Interior to trick these Indians out of their homes, or to deprive them thereof by force; and petitioner's argument to the effect that the federal government *could* do all these things without incurring legal liability therefor is entirely beside the point. The federal government tried to treat these Indians fairly. Its representatives drafted what was considered at the time a fair treaty by which the Indians gave up part of their lands in exchange for certain goods and services that would enable them to exact a better living from a smaller tract of land. But because the treaty reached Congress at the end of one session, and by accident was not transmitted at the proper time in the next session [1], it was never ratified. The situation of the plaintiff tribes was complicated and confused, the number of Indians af-

[1] Finding 4, Record, p. 33.

fected was not very large, and Congress had more important matters to attend to.

By 1935, however, the record before Congress showed that a wrong had been done not only to a lost generation, but also to living American citizens. The respondent Indians, once among the wealthiest in North America [2] had sunk to the most pitiful level of subsistence. The Meriam report of 1928 [3] which was the chief guide for Indian legislation in the following decade [4] showed (a) that the Indians who comprised the Siletz jurisdiction (which included the four tribes who are respondents here) were almost at the bottom, being third from the lowest of 66 listed, of the economic scale among Indian tribes, having an annual income of only $27 per capita, [5] while their neighbors, the Klamaths, whose treaty had not been forgotten and who still held part of their aboriginal estate were the second highest in the economic scale with an annual income of $1,523 per capita.[6] In short, the living members of the respondent tribes were penniless and landless because through a series of accidents their ancestors had been deprived of their land without compensation.

Congress tried in 1935 to do the right thing, and assigned to the Court of Claims the task of unraveling the tangled skein of history, and of doing justice. This the Court of

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[2] Underhill: *Indians of the Pacific Northwest* (1945), p. 1.

[3] Meriam: *The Problem of Indian Administration*, 1928.

[4] "The decade from 1930 to 1939 is as notable in the history of Indian legislation as that of the 1830's or the 1880's. Through the series of general and permanent laws enacted in the field of Indian affairs during this decade there runs the motive of righting past wrongs inflicted upon a nearly helpless minority. The sense of these wrongs owed much to the labors that went into the Meriam report, much to the investigations conducted by the Senate, and much to the volunteer labors of individuals and organizations willing to assume the thankless task of criticizing the workings of our governmental institutions." Cohen: *Handbook of Federal Indian Law*, p. 83.

[5] Meriam: *Ibid.*, p. 449.

[6] Meriam: *Ibid.*, p. 450.

Claims, with painstaking regard for the facts of the case, has done. But the Department of Justice now contends that all the efforts of Congress and all the labors of the Court of Claims and all the toil and struggle of the parties over a period of many years and down to the present time have been waste motion, and that *no matter what the facts were, the Indians cannot recover* under the jurisdictional Act that Congress passed for their benefit. In substance, petitioner contends that Congress in 1935 was tricking the Indians when it authorized them to bring suit for a taking of their "original Indian title", since under petitioner's view of the law the taking of such title *cannot* be the subject of *any* suit in the Court of Claims.

The Issue.

The issue is whether a trustee who, by the exercise of admittedly legal acts, has brought about the destruction of his beneficiary's estate and now holds part thereof for the trustee's own account, having sold the rest and pocketed the proceeds, is liable for the value of the estate thus taken, when the trustee's prior immunity to suit as a sovereign is waived. This issue is of particular international significance today when the United States is considering the assumption of trusteeship responsibilities toward native groups in the Pacific and elsewhere whose international status is analogous to that of the Oregon Indian tribes in 1855.[7] The position of petitioner in its argument is that the United States has ever been faithless to its trust from 1855 to 1946. The truth of the matter appears to be that in its dealings with these Indians the United States has

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[7] See W. G. Rice, Jr., of University of Wisconsin Law School on "The Position of the American Indian in the Law of the United States" in *The Journal of Comparative Legislation and International Law*, Third Series, Vol. XVI, Part I, p. 78, London, Feb. 1934.

tried to do the right and decent thing. It has made mistakes but, as President Truman said in approving the Indian Claims Commission Act of August 13, 1946, "We stand ready to correct any mistakes we have made." It is in this spirit that the issue in this appeal should be viewed, and not in a spirit of a search for technicalities to whittle away the international obligations of a trustee which were fully and deliberately assumed by the United States.

Summary of Argument.

Petitioner argues that the United States, the trustee in this case, is immune from liability because it has not been shown that the United States ever recognized the beneficial estate of the respondents, or if it did so at all recognized it with only its executive eye while winking its legislative eye. The defects of this argument are threefold, namely:

1. The rule of law urged by petitioner is not supported by precedent or reason. One who assumes trusteeship of an estate cannot escape an accounting for its disposal by pleading ignorance of its extent.

2. The facts of the case are not as urged by petitioner. The trustee knew the extent of the estate and of respondents' claims, and knew all about the dispositions it had made thereof.

3. The proper conclusion from petitioner's contentions is not that the suit should be dismissed or that this Court should decide the case on its merits in favor of the government, but rather that it should be remanded for determination by the trial court of what petitioner regards as an essential issue of fact, namely, whether respondents' claims were ever recognized by the United States.

Argument.

1. *Liability of the United States for a taking of Indian lands is not dependent on whether the Indian claim or title had been previously recognized.*

There is no basis in law or reason for this distinction.

The Department of Justice in its argument emphasizes the contention that the government can without liability terminate any "unrecognized" Indian title, with which contention we readily agree. From that starting point petitioner goes on to draw an artificial distinction between an "unrecognized" and a "recognized" title, concluding that the latter is different in that the latter cannot be terminated without liability. Specifically it contrasts "recognized" and "unrecognized" titles by asserting that ". . . unrecognized Indian title can be terminated by the sovereign at will" (Brief, p. 12), and that ". . . a recognized title . . . is protected against an uncompensated taking by the United States" (Brief, p. 13). That is sheer rationalization and ignores the law of the land. *Of course* the Congress can without liability take away "unrecognized" Indian title; but it can legally do much more than that—it can without liability take away *"recognized"* Indian title also,—even treaty-recognized Indian title. This court has repeatedly held that Indian title, even if formally recognized by ratified treaty, may nevertheless be terminated by the sovereign at will and without liability. (*Lone Wolf v. Hitchcock*, 187 U.S. 553.) Indeed, most of the cases cited by petitioner (Brief, pp. 22-23) to show the power of the government over original titles actually deal with titles recognized by treaties.[8]

[8] *Fletcher* v. *Peck*, 6 Cranch 87 (1810), Treaty of 1732.
Johnson v. *McIntosh*, 8 Wheat. 542 (1823), Treaty of Feb. 10, 1763.
Clark v. *Smith*, 13 Pet. 195 (1839), Treaty of October 19, 1818.
Martin v. *Waddell*, 16 Pet. 366 (1842), Agreement of March 3, 1676.
Buttz v. *Northern Pacific*, 119 U. S. 55 (1886), Treaties of May 2, 1867, and of June 19, 1873.

Thus, so far as the government's *power* and *authority* go, there is no distinction between "recognized" and "unrecognized" titles. But just because the government *can* so take without compensation, it does not necessarily follow that it needs *must* do so. Congress is the judge and has the power to decide when and how the government will assume liability, and the power to draw such distinctions as it desires. It also sets the limits within which the executive branch of the government can act. The authority of the executive branch might well depend on whether the title subject to extinguishment was a "recognized" or an "unrecognized" one, but if that is the case it is so because, and only because, Congress has so directed it. Therefore, any distinction which the executive branch ever draws between a "recognized" and an "unrecognized" title is meaningless and irrelevant as an argument in support of petitioner's contention in the case at bar, since in each case one must look to the authority and power granted by Congress rather than to the exercise thereof by the executive branch. On the other hand, however, *Congress* may draw distinctions or it may disregard them. It clearly has the constitutional power to permit suit for a taking of Indian lands, whether those lands have heretofore been held under "recognized" or "unrecognized" title. Petitioner's argument amounts to a tenuous metaphysical objection that an Act of Congress allowing suit for a taking of original landholdings is powerless to bring about the result that Congress intended. This Court has never held that Congress is powerless to redress a taking of aboriginal lands. It has said repeatedly that the Indian right and title in such lands is as sacred as the fee.

Also petitioner seems to assume that because the Indians in 1855 had only a moral right to complain about the government's taking their lands without compensation, no legal rights in them are possible. The fact that they have a

moral right in the premises does not mean that they have no legal right. The moral right became a legal right on August 26, 1935 when the President signed the jurisdictional Act of Congress giving a mode of redress for what had once been *damnum absque injuria.* From that moment on the United States was in the same legal position as any non-sovereign trustee who has disposed of the property of his ward for his own gain.[9] Also it should be pointed out that there is a definite trend, both in the decisions of this Court[10] and in the enactments of Congress,[11] away from governmental immunity from suit.

2. *Respondents' claims were recognized.*

Petitioner nowhere shows that the land claims of respondent tribes were "unrecognized". In fact, such claims were recognized in the manner in which most Indian rights have always been recognized, namely, by Congress' first enacting a general rule for the extinguishment of these claims through negotiation, and for their protection against private trespass pending governmental extinguishment, followed by the determination by administrative authorities of boundaries under that rule.[12] This has always been the cus-

[9] *Oliver* v. *Piatt*, 3 How. 333 (1845).
May v. *LeClaire*, 11 Wall. 217 (1870).
McComb v. *Frink*, 149 U. S. 629 (1893).
American Law Institute, Restatement, Trusts, Vol. 1, Sec. 208 (1).

[10] *Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381 (1939), where this court talks about ". . . the present climate of opinion which has brought governmental immunity from suit into disfavor . . ." (p. 391), and ". . . a steadily growing policy of governmental liability . . ." (p. 396), and ". . .expanding conceptions of public morality regarding governmental responsibility . . ." (p. 396).

[11] Title IV (the Federal Tort Claims Act) of Public Law 601—79th Congress, Chapter 753—2nd Session, approved August 7, 1946.

[12] Treaty of October 3, 1818, 7 Stat. 188; Act of June 7, 1924, 43 Stat. 596; Act of April 14, 1926, 44 Stat. 252; Act of June 3, 1926, 44 Stat. 690; Act of January 31, 1931,46 Stat. 1046; Act of June 14, 1934, 48 Stat. 960; Act of June 18, 1934, 48 Stat. 984; Act of April 17, 1937, 50 Stat. 69.

tomary and normal method by which Indian rights, in particular areas, have been specified.[13]

The Act of August 14, 1848 [14] was the general rule laid down by Congress for the Oregon country. It provided that the inhabitants of Oregon, including specifically the Indians, were to have the benefit of laws protecting Indian lands; and it expressly protected ". . . . the rights of persons or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty . . . .". Specifically included in the latter Act was the Northwest Ordinance of 1787, the cornerstone of our national Indian policy, which promised that the "utmost good faith shall always be observed toward the Indians" and pledged that "their lands and property shall never be taken from them without their consent".

This statutory recognition of the land rights of Oregon Indians was implemented by the Act of June 5, 1850 [15] which laid down general rules for the extinguishment of the claims of the Indian tribes of Oregon to lands in that State, and for the appointment of commissions to negotiate treaties with the several tribes for the extinguishment of their

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[13] See *United States* v. *Birdsall*, 233 U. S. 223 (1914), where Chief Justice Hughes (then associate justice), in describing the functions of the Office of Indian Affairs, said "The object of the establishment of the office was to create an administrative agency with broad powers adequate to the execution of the policy of the Government, as determined by the acts of Congress with respect to the Indians under its guardianship" (p. 232), and "in executing the powers of the Indian Office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law." (p. 235); and *Bridgeman* v. *United States*, 140 Fed. 577 (1905) where the court said at page 583: "Counsel are agreed that the rules and regulations of the Indian Department promulgated under the authority of law have the force and effect of statutes, and that the court will take judicial notice of them."

[14] 9 Stat. 323.

[15] 9 Stat. 437.

claims to lands lying west of the Cascades (being the very area here involved), and extended the law regulating trade and intercourse over such tribes. The Indian Trade and Intercourse Act of June 30, 1834 [16] which protected Indian lands, whatever the form of their tenure, against trespass, made the executive branch of the government responsible for such protection and thus necessarily responsible for determining what lands were in fact Indian lands.

Further particularization, including the determination of boundaries, was left to administration which was very extensive during the years that followed. The record before the Court of Claims showed acts of administration duly authorized by law which at least from 1854 to 1941 consistently recognized the original land claims of the respondent tribes.[17] Presidents, Secretaries, Commissioners and Superintendents had given such recognition in forms authorized by law. The highest legal officer in the United States (Attorney General Cushing), in the course of the original negotiation with the respondent tribes in 1855 had supported the validity of the Indian claims in his preliminary opinion of August 2, 1854 and a fuller opinion of June 22, 1855.[18]

3. *In no event is dismissal of the suit warranted.*

Finally, it should be observed that if petitioner were correct both in its view of the law and in its contention that the Court of Claims failed to find a "recognized" Indian title in the case at bar, the proper conclusion to draw would be that the case should be remanded to the Court of Claims for specific determination of the issue whether respondents' title or claim was or was not recognized. To argue, as petitioner does, that "the Court of Claims made no finding that

[16] 4 Stat. 729.

[17] See pages 22-27 of Brief for Respondents.

[18] 7 Op. Atty. Gen. 293.

the United States had recognized respondents' original title" (Brief, p. 34) is not to establish that respondents' title was unrecognized but merely to establish that the findings of fact fail to contain a determination upon an essential issue. If that be so (although it seems to us clear that the Court of Claims did find administrative recognition authorized by law) then the proper conclusion from the government's argument is that the case should be remanded for further determination by the Court of Claims of an essential issue of fact. If as petitioner argues "the absence of a necessary finding may not be cured by statements in the opinion" (Brief, p. 34), neither may it be cured by statements in a brief nor by dismissal of the complaint.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

October 1946

NATIONAL CONGRESS OF
AMERICAN INDIANS

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pp. 7, 13

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1946.

United States of America, Petitioner, v. Alcea Band of Tillamooks, et al., Respondents.	On Writ of Certiorari to the Court of Claims.

[November 25, 1946.]

The Chief Justice announced the judgment of the Court and delivered an opinion, in which Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Murphy joined.

Eleven Indian tribes have sued the United States in the Court of Claims under the Act of 1935,[1] which gives that court jurisdiction to hear and adjudicate cases involving "any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in . . . the lands, . . . occupied by the Indian tribes and bands described in" certain unratified treaties negotiated with Indian tribes in the Territory of Oregon.

[1] 49 Stat. 801. The pertinent section in full provides: "That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment . . . (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grand Ronde, and the Siletz Reservations in said Territory."

Four of the tribes,[2] the Tillamooks, Coquilles, Too-too-to-neys and Chetcos, successfully identified themselves as entitled to sue under the Act, proved their original Indian title [3] to designated lands, and demonstrated an involuntary and uncompensated taking of such lands. The Court of Claims thereupon held that original Indian title was an interest the taking of which without the consent of the Indian tribes entitled the latter to compensation. In answer to government contentions that original Indian title, in the absence of some form of official "recognition", could be appropriated without liability upon the part of the sovereign, the Act of 1848,[4] establishing the Territory of Oregon, was cited by the Court of Claims as affording any recognition required to support the claim for compensation. The issues decided, not previously passed upon by this Court and being of importance to the administration of Indian affairs, prompted this Court to grant certiorari. The case was argued during the 1945 term and on April 1, 1946, was restored to the docket for reargument before a full bench.

The events giving rise to the claims here occurred as part of the opening and development of the Territory of Oregon. After creating a government for that territory

[2] The remaining seven plaintiff tribes failed to state a cause of action under the jurisdictional act and the rules of the Court of Claims.

[3] "Original Indian title" is used to designate the Indian right of occupancy based upon aboriginal possession.

[4] 9 Stat. 323. The Act created a territorial government and declared: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed."

by the Act of 1848.[5] Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. Under the latter Act,[6] Anson Dart, later succeeded by General Joel Palmer, was appointed Superintendent of Indian Affairs for the Oregon region and was instructed to negotiate treaties for the extinguishment of Indian claims to lands in that district. On August 11, 1855, Palmer and respondent tribes concluded a treaty providing for the cession of Indian lands in return for certain money payments and the creation of a reservation. The treaty was to be operative only upon ratification. It was not submitted to the Senate until February, 1857, and was never ratified.

Pending expected ratification, and following recommendations from Palmer, the President on November 9, 1855, created a reservation, subject to future diminution and almost identical with that provided for in the treaty. A large part of this reservation, called the Coast or Siletz Reservation, consisted of lands to which the Tillamook Tribe held original Indian title. Almost immediately the Tillamooks were confined to that portion of their land within the reservation, and the other three respondent tribes, as well as other tribes, were moved from their original possessions to the reservation. In 1865 an Executive Order reduced the size of the reservation; in 1875 Congress by statute approved the Executive Orders of 1855 and 1865, and in order to open more land for public settlement, removed additional land from the reservation. By an Act of 1894,[7] Congress officially accepted and approved the reservation as it then existed, and thenceforward did not take reservation lands without compensation.

The claims of respondent tribes are for the wrongful taking which occurred when they were deprived of their original possessions by the Executive Order of November

[5] 9 Stat. 323.
[6] 9 Stat. 437.
[7] 28 Stat. 286, 323.

9, 1855. Even as to the Tillamooks, the Court of Claims found the taking complete as of November 9, 1855, since this tribe was forced to share its former lands with other Indians, and since the reservation was, in any event, only a conditional one, subject to being opened for public settlement at the will of the President. Petitioner disputes neither this finding nor the proof of original Indian title as of 1855.

Other than the benefits flowing from the Act of 1894,[8] none of the four respondent tribes has received any compensation for the loss of its lands. Until the present jurisdictional act of 1935, these tribes, lacking consent of the United States to be sued, were forbidden access to the courts. They alone of the tribes with whom Dart and Palmer negotiated some twenty-odd treaties between 1850 and 1855 have yet to receive recognition for the loss of lands held by original Indian title.[9]

Until now this Court has had no opportunity or occasion to pass upon the precise issue presented here. In only one act prior to 1935 has Congress authorized judicial determination of the right to recover for a taking of nothing more than original Indian title; and no case under that act,[10] passed in 1929, reached this Court.[11] In 1930 [12] Con-

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[8] 28 Stat. 286, 323.

[9] In 1851 Dart and Palmer negotiated treaties with nineteen tribes other than respondents. None of these treaties was ratified; but twelve of the nineteen tribes were included in further treaties made in 1853, 1854, and 1855, and Congress in 1897 and 1912 provided for paying the remaining seven tribes for their lands taken under the unratified treaties.

[10] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[11] *Coos Bay Indian Tribe et al.* v. *United States*, 87 Ct. Cl. 143 (1938), discussed *infra* p. 10, arose under the 1929 Act.

[12] 46 Stat. 531, amending 44 Stat. 1263. *Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347 (1933) was litigated under this jurisdictional act.

gress again authorized adjudication of Indian claims arising out of original Indian title, but expressly directed an award of damages if a taking of lands held by immemorial possession were shown. This act thus eliminated any judicial determination of a right to recover, once original Indian title was established.

Prior to 1929, adjudications of Indian claims against the United States were limited to issues arising out of treaties, statutes, or other events and transactions carefully designated by Congress. This Court has always strictly construed such jurisdictional acts and has not offered judicial opinion on the justness of the handling of Indian lands, except in so far as Congress in specific language has permitted its justiciable recognition.

The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted nor denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. The cases are to be heard on their merits and decided according to legal principles pertinent to the issues which might be presented under the Act.[13] Accordingly the 1935 statute permits judicial determination of the legal and equitable claims growing out of original Indian title. That which was within the power of Congress to withhold from judicial scrutiny has now been submitted to the courts. If, as has many times been said,[14] the manner of extinguishing Indian title is usually a political question and presents a non-justiciable issue, Congress has expressly and effectively directed otherwise by seeking

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[13] *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500 (1913); The Sac and Fox Indians, 220 U. S. 481, 489 (1911).

[14] *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347 (1941), and cases note 27 *infra*.

in the 1935 Act judicial disposition of claims arising from original Indian title. "By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide, as between man and man. . . ." *United States* v. *Arredondo*, 6 Pet. 691, 711 (1832).

It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign.[15] This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.

As against any but the sovereign, original Indian title was accorded the protection of complete ownership;[16] but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy.[17] Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.

We cannot but affirm the decision of the Court of Claims. Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid. In speaking of the original claims of the Indians to their lands, Marshall had this to say:

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[15] *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–74 (1823).

[16] *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941).

[17] *Beecher* v. *Wetherby*, 95 U. S. 517 (1877).

"It is difficult to comprehend the proposition . . . that the discovery . . . should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors. . . . It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. . . . The king purchased their lands, . . . but never coerced a surrender of them." *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547 (1832). In our opinion, taking original Indian title without compensation and without consent does not satisfy the "high standards for fair dealing" required of the United States in controlling Indian affairs." *United States* v. *Santa Fe R. Co.*, 314 U. S. 339, 356 (1941). The Indians have more than a merely moral claim for compensation.[18]

A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands in the main progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims, as the analysis in *Worcester* v. *Georgia*, *supra*, clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation.[19] The

[18] The "moral" obligation upon Congress, of which the cases speak, refers more to the obligation to open the courts to suit by the Indians. It does not mean that there is no substantive right in the Indians. So in *United States* v. *Blackfeather*, 155 U. S. 180, 194 (1894) it was held that, "While there may be a moral obligation on the part of the Government to reimburse the money embezzled by the Indian superintendent . . . .", the jurisdictional act in point did not extend to such a claim. Yet, given consent to suit, it would hardly be said that there was no substantive right against the United States for embezzlement of Indian funds.

[19] "The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest. . . . The conquerors have never claimed more than the exclusive right of purchase from the Indians . . ." 1 Op. A. G. 465, 466 (1821) (William Wirt).

great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title.[20] In 1896, this Court noted that ". . . nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." *Marks* v. *United States*, 161 U. S. 297, 302 (1896). Something more than sovereign grace prompted the obvious regard given to original Indian title.

Long before the end of the treaty system of Indian government and the advent of legislative control in 1871,[21] Congress had evinced its own attitude toward Indian relations. The Ordinance of 1787 declared, "the utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent . . ." 1 Stat. 50. When in 1848 the territorial government of Oregon was created, § 14 of that Act [22] secured to the inhabitants of the new territory all the rights and privileges guaranteed by the Ordinance of 1787. Nor did Congressional regard for Indian lands change in 1871. In providing for the settlement of Dakota Territory, Congress in 1872 directed the extinguishment of the interests of Indians in certain lands and the determination of what "compensation ought, in justice and equity, to be made to said bands . . . for the extinguishment of whatever title they may have to said lands." 17 Stat. 281; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 59 (1886). The latest indicia of Congressional regard for Indian claims is the Indian Claims Commission Act, Pub. No. 726, 79th Cong., 2d Sess., in which not only are claims similar to those of the case at bar to be heard, but "claims based upon

[20] See the analysis in Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1945) 51–66.

[21] 16 Stat. 544.

[22] 9 Stat. 323, 329, § 14.

fair and honorable dealings that are not recognized by any existing rule of law or equity" may be submitted to the Commission with right of judicial review.

Congressional and executive action consistent with the prevailing idea of non-coercive, compensated extinguishment of Indian titl is clear in the facts of the present case. The Act of 1848 declared a policy of extinguishing Indian claims in Oregon only by treaty. The statute of 1850 put in motion the treaty-making machinery. Respondent tribes were among those with whom treaties were negotiated. In many cases, expected ratification did not follow. In the case of respondent tribes alone have no steps been taken to make amends for the taking of Indian lands pending treaty ratification. To determine now that compensation must be paid is only a fair result.

Petitioner would admit liability only if, in addition to clear proof of original Indian title, some act of official "recognition" were shown. Original Indian title would not attain the status of a compensable interest until some definite act of sovereign acknowledgment followed. Apparently petitioner has seized upon language of the Court of Claims in *Duwamish et al. Indians* v. *United States*, 79 Ct. Cl. 530 (1934), and from it has fashioned a full-blown concept of "recognized Indian title." The jurisdictional act in that case authorized suits on "all claims of whatever nature, both legal and equitable."[23] Claims based solely on original Indian title were held to be outside the limits of the act; and unless a treaty or act of Congress recognizing the Indians' title by right of occupancy were shown, recovery could not be had.[24] A more specific jurisdictional act was deemed necessary to authorize a suit based upon original Indian title alone.

[23] 43 Stat. 886.

[24] *Duwamish et al. Indians* v. *United States*, 79 Ct. Cl. 530, 600 (1934).

Petitioner reads into the *Duwamish* case far too much. When the first jurisdictional act specifically allowing suit on original Indian title in language identical with that of the 1935 Act later came before the Court of Claims in *Coos Bay Indian Tribe et al.* v. *United States*, 87 Ct. Cl. 143 (1938), the court clearly recognized the specific directives of the act and denied recovery solely because original Indian title had not been proved. "Recognition" appeared to count only as a possible method of proving Indian title itself, not as a requisite in addition to proof of that title. Furthermore, in the case at bar, the unmistakable language of the Court of Claims stands squarely against the significance petitioner would attach to the *Duwamish* decision: "The *Duwamish* case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of suit and rendition of judgment for compensation on the basis of such original title." *Alcea Band of Tillamooks et al.* v. *United States*, 103 Ct. Cl. 494, 556 (1945).

Authority for petitioner's position is not found in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U. S. 335 (1945). The jurisdictional act there limited suits to those claims "arising under or growing out of the treaty of July 2, 1863 . . ."[25] Suits based upon original Indian title were not authorized, but we thought a claim would properly arise under the treaty if it were based upon a taking of land which the treaty had in any way "recognized" or acknowledged as belonging to the Indians. The Court thrice noted that claims based upon original Indian title were not involved, and made no attempt to settle controversies brought under other jurisdictional acts au-

[25] 45 Stat. 1407.

thorizing the litigation of claims arising from the taking of original Indian title.[26]

Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co., supra,* at 347.[27] Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recognized" title;[28] yet it cannot be doubted that, given the

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[26] *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U. S. 335, 337, 339, 354 (1945).

[27] The statements in many cases are directed to disputes between third parties, one of whom attempts to raise a defect in othe other's title by tracing it to a government grant out of Indian territory and attacking the power or the method used by the sovereign to convey Indian lands. *Beecher* v. *Wetherby*, 95 U. S. 517, 525 (1877); *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66 (1886); *Martin* v. *Waddell*, 16 Pet. 367, 409 (1842); *Clark* v. *Smith*, 13 Pet. 195, 201 (1839). And in other cases, the issue was not the right of Indian tribes to be compensated for an extinguishment of original Indian title by the United States. *Shoshone Indians* v. *United States*, 324 U. S. 335 (1945); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941); *Conley* v. *Ballinger*, 216 U. S. 84 (1910); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902).

[28] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566 (1903); *Beecher* v. *Wetherby*, 95 U. S. 517, 525 (1877). The *Lone Wolf* case was properly assessed in *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497 (1937): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted

consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title.[29] We think the same rule applicable to a taking of original Indian title. "Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then only upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388–89 (1902).[30]

Requiring formal acknowledgment of original Indian title as well as proof of that title would nullify the in-

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in many ways and at times in derogation of the provisions of a treaty." See also *Oklahoma* v. *Texas*, 258 U. S. 574, 592 (1922).

In *Barker* v. *Harvey*, 181 U. S. 481 (1901), the Indian claims were deemed extinguished by non-presentment to the land commission, and this was true even if the claims had been "recognized" by the Mexican government prior to the cession of lands to the United States.

[29] *United States* v. *Klamath Indians*, 304 U. S. 119 (1938); *Chippewa Indians* v. *United States*, 301 U. S. 358 (1937); *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Creek Nation*, 295 U. S. 103 (1935).

[30] Other cases also draw no distinction between original Indian title and "recognized" Indian title. "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." *Spalding* v. *Chandler*, 160 U. S. 394, 403 (1896). Of similar tenor is *Conley* v. *Ballinger*, 216 U. S. 84, 90–91 (1910).

The older cases explaining and giving substance to the Indian right of occupancy contain no suggestion that only "recognized" Indian title was being considered. Indeed, the inference is quite otherwise. *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835); *Worcester* v. *Georgia*, 6 Pet. 515, 543–48 (1832); *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–74 (1823).

tended consequences of the 1935 Act. The rigors of "recognition", according to petitioner's view, would appear to require in every case some definite act of the United States guaranteeing undisturbed, exclusive and perpetual occupancy, which, for example, a treaty or statute could provide. Yet it was the very absence of such acknowledgment which gave rise to the present statute.

Congress was quite familiar with the precision advisable when drafting statutes giving jurisdiction to the Court of Claims in Indian cases. In 1925, an act authorizing the litigation of "any and all" claims of certain Indian tribes was passed. In June, 1934, that act was held, for lack of specificity, not to extend to claims based on original title.[31] The following year Congress passed the present act, employing the specific language used once before in the act of 1929,[32] under which *Coos Bay Indian Tribe et al. v. United States, supra*, arose. The considered attention given to the many ramifications of Indian affairs in the 1930's [33] suggests that Congress well realized the import of the words used in the jurisdictional act of 1935, and that Congress did not expect respondent tribes to be turned out of court either because Congressional power over Indian title was deemed to have no limits or because there was, as was obvious to all, no formal guarantee of perpetual and exclusive possession prior to the taking of respondents' lands in 1855.

Respondents have satisfactorily proved their claim of original Indian title and an involuntary taking thereof. They are entitled to compensation under the jurisdictional act of 1935. The power of Congress over Indian affairs

[31] *Duwamish et al. Indians v. United States*, 79 Ct. Cl. 530 (1934).

[32] 45 Stat. 1256, as amended in respects immaterial here, 47 Stat. 307.

[33] "The decade from 1930 to 1939 is as notable in the history of Indian legislation as that of the 1830's or the 1880's." Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1945) 83.

may be of a plenary nature; but it is not absolute." It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935).

In view of the grounds upon which decision rests, it is not necessary to consider the alternate holding of the court below relative to the 1848 act affording sufficient "recognition" of respondents' Indian title.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

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[a] *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478 (1899).

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1946.

United States of America, Petitioner, v. Alcea Band of Tillamooks, et al., Respondents.	On Writ of Certiorari to the Court of Claims.

[November 25, 1946.]

Mr. Justice Black, concurring.

Before Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or equitable obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded. See *Northwestern Shoshone Indians* v. *United States*, 324 U. S. 335, 354–358, concurring opinion. It seems pretty clear to me, however, that Congress in the Act of 1935, 49 Stat. 801, created an obligation on the part of the Government to pay these Indians for all lands to which their ancestors held an "original Indian title." This interpretation of the Act is not only consistent with the unusually broad language Congress used, but also fits into the pattern of congressional legislation which has become progressively more generous in its treatment of Indians. The capstone of this type of legislation was an Act passed by the last Congress, which established an Indian Claims Commission with sweeping powers to pay old Indian claims growing out of seizure of their lands, among other things. This Commission is given power to make awards, subject to review by the Court of Claims, with and without regard to previous rules of law or equity courts. The Commission is even given a blanket power to make awards upon finding, for example, that the land of Indians was

taken by the Government in a way that did not comport with "fair and honorable dealings." Pub. L. No. 726, 79th Cong., 2d Sess., § 2 (5). Since whatever our action here, these Indians could, I assume, pursue their claims under this broad recent legislation, and since the language of the Act before us does not preclude a similarly broad interpretation, I see no reason why it should be otherwise interpreted. This leads me to concur in affirmance of the judgment.

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1946.

United States of America, Petitioner, *v.* Alcea Band of Tillamooks, et al., Respondents.	On Writ of Certiorari to the Court of Claims.

[November 25, 1946.]

Mr. Justice Reed, with whom Mr. Justice Rutledge and Mr. Justice Burton join, dissenting.

This case presents directly for the first time in this Court the question of whether an Indian band is legally entitled to recover compensation from the United States for the taking by the Government of the aboriginal lands of the Indians when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land. The Court allows compensation. The importance of the issue persuades us that we should express the reasons for our dissent. It is difficult to foresee the result of this ruling in the consideration of claims by Indian tribes against the United States. We do not know the amount of land so taken. West of the Mississippi it must be large. Even where releases of Indian title have been obtained in return for recognition of Indian rights to smaller areas, charges of unfair dealings may open up to consideration again legal or equitable claims for taking aboriginal lands.[1]

[1] See Indian Claims Commission Act, approved August 13, 1946, Pub. No. 726, 79th Cong., 2d Sess.:

"Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United

The Court rightly states the effect of the jurisdictional act in these words:

> "The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. [Slip op., p. 5.]
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> . . . . . .
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> "Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title." [Slip op., p. 11.][2]

This means, and the Court so treats the claims, that the Indians here get no money by grace or charity or for reasons of honorable dealings with helpless peoples.[2] The

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States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

"All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

[2] There are sound reasons for Congressional generosity toward the remnants of the aborigines. Such reasons as lead the Nation to succor the vanquished in any contest. Cf. *United States* v. *Realty Company*, 163 U. S. 427; *Pope* v. *United States*, 323 U. S. 1; and Public No. 726, 79th Cong., 2d Sess., § 24.

recovery by them under this act will be because they have had valid claims against the United States on account of their ouster from these lands in 1855. These Indians have not been paid the sums owing them, one deduces from the Court's opinion, because the sovereign, our nation, kept the courts closed to them. The jurisdictional act, the Court holds, removes this bar to recovery. This conclusion conflicts with our understanding of this Government's right in the public lands of the nation.

The character of Indian occupancy of tribal lands is at least of two kinds; first, occupancy as aborigines until that occupancy is interrupted by governmental order; and, second, occupancy when by an act of Congress they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by act of Congress, they have a right of occupancy which cannot be taken from them without compensation.[3] But by the other type of occupancy, it may be called Indian title, the Indians get no right to continue to occupy the lands; and any interference with their occupancy by the United States has not heretofore given rise to any right of compensation, legal or equitable.[4]

This distinction between rights from recognized occupancy and from Indian title springs from the theory under which the European nations took possession of the lands of the American aborigines. This theory was that discovery by the Christian nations gave them sovereignty over and title to the lands discovered. *Johnson* v. *M'Intosh*, 8 Wheat. 543, 572–86; 1 Story, Commentaries on the Constitution (5th Ed.) § 152. While Indians were permitted to occupy these lands under their Indian title,[5] the con-

[3] *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–76; *United States* v. *Klamath Indians*, 304 U. S. 119; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Creek Nation*, 295 U. S. 103, 109–10.

[4] See *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

[5] See *Mitchel* v. *United States*, 9 Pet. 711, 745.

quering nations asserted the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss.[6] It is not for the courts of the conqueror to question the propriety or validity of such an assertion of power. Indians who continued to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted. Tenure for Indian tribes specifically recognized by Congress developed along different lines in the original states, the Louisiana Purchase, the Mexican Session or the lands obtained by the Northwest Boundary Treaty. But there is no instance known to us where there has been intimation or holding that Congressional power to take Indian title to lands is limited. Whenever the lands to which the Indians had only Indian title were required for settlement or public use, the sovereign without legal obligation could extinguish that title by purchase or the sword.[7]

In *Barker* v. *Harvey*, 181 U. S. 481, Mission Indians claimed a right of permanent occupancy in former Mexican lands ceded to the United States by the treaty of Guadalupe Hidalgo. They made this claim against a right arising by virtue of a patent that was issued by the United States in confirmation of grants by the Mexican Government in derogation of the Indian title. This Court said as to this Indian title, p. 491, "that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the

[6] The Treaty of Paris, 1783, confirmed the sovereignty of the United States without reservation of Indian rights.

[7] *Johnson* v. *M'Intosh*, *supra*, at 587–89; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 117. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

United States."[8] This Court confirmed title contrary to the Indian claim. Rights of occupancy given to Indians by an executive order may be withdrawn without compensation to the Indians where their title was not recognized by Congressional act. The Indians do not hold such lands by the same tenure as they do the lands by the terms of a ratified treaty or statute. *Sioux Tribe* v. *United States*, 316 U. S. 317, 326–28.

As we understand the present holding of the Court, it is that the manner of terminating this Indian title by the United States is limited by the duty to pay compensation. Therein, we think, lies the fundamental error of the Court's opinion. It is true that distinctions have been made between plenary authority over tribal lands and absolute power, with the suggestion that Congressional power over Indian title was not unlimited. See Cohen, Handbook of Indian Law, 94, 291, 309, 310, 311. Examination of the authorities cited, however, will show, we think, in every instance that where reference is made to the protection of Indian lands by the Fifth Amendment or to the legal obligation of the United States to compensate Indians for lands taken, the lands under discussion were lands held by the Indians under titles recognized by specific acts of Congress.[9]

When Chief Justice Marshall expounded for the Court the power of the United States to extinguish Indian title, this doctrine was laid down for the nation's guidance in dealing with the Indians:

> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold,

[8] Cf. *Duwamish et al. Indians* v. *United States*, 79 Ct. Cl. 530, 597–600.

[9] E. g. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *United States* v. *Creek Nation*, 295 U. S. 103, 109; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–77.

and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

". . . All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

". . . Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. . . .

. . . . . .

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. . . . Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.

. . . . . .

". . . the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing

their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." 8 Wheat. 587–91.

It is unnecessary for this case to undertake at this late date to weigh the rights and wrongs of this treatment of aboriginal occupancy. Where injustices have been done to friendly peoples, Congress has sought to soften their effect by acts of mercy. Never has there been acknowledgment before of a legal or equitable right to compensation that springs from the appropriation by the United States of the Indian title.

"Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz* v. *Northern Pacific Railroad*, *supra*, p. 66. As stated by Chief Justice Marshall in *Johnson* v. *M'Intosh*, *supra*, p. 586, 'the exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by pur-

chase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby*, 95 U. S. 517, 525." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347.

The colonies, the states and the nation alike by their early legislation provided that only the respective sovereigns could extinguish the Indian title.[10] The way in which it was to be extinguished has been held, continually, a political matter.[11] The jurisdictional act now under consideration does not purport to change a political matter to a justiciable one.

When this present jurisdictional act was considered by Congress, nothing in the reports or the debates [12] indicates that Congress intended to create a new liability because Indian title had been taken. This Court relies upon no change of attitude in Congress, but finds that this liability has always existed and that this act merely removes the bar against suit. This we think is contrary to the whole course of our relations with the Indians.

The Court finds a basis for this action in that this nation should not take the Indian title without compensation because such a taking would not satisfy the " 'high standards for fair dealing' required of the United States in controlling Indian affairs." The language used by the Court is taken from *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 at 356. It there referred to an act unauthorized by Congress and not to such takings as here occurred when

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[10] See passim, Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs, from 1633 to 1831, inclusive: With an Appendix Containing the Proceedings of the Congress of the Confederation and the Laws of Congress, from 1800 to 1830, on the Same Subject.

[11] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311.

[12] See S. Reps. Nos. 571, 795, 1134, 74th Cong., 1st Sess.; H. Rep. No. 1085, 74th Cong., 1st Sess.; 79 Cong. Rec. 7806, 11188, 12520.

Congress opened the original home of these respondents for settlement.

In *Worcester* v. *Georgia*, 6 Pet. 515, 543, 544, 547, lands had been specifically set apart for the Cherokees. P. 556. Therefore Chief Justice Marshall's comments were directed at a situation that does not exist here.

A concurring opinion has been filed which holds that Congress in the act here involved "created an obligation on the part of the Government to pay these Indians" for their Indian title. We do not think this present act is susceptible of that interpretation. We read the act, as we understand the opinion of the Court does, to permit recovery of compensation only in case there were rights in the Indians prior to its passage "arising under or growing out of the original Indian title." We think no rights arose from this Indian title. Therefore no compensation is due.

As we are of the opinion that the jurisdictional act permitted judgment only for claims arising under or growing out of the original Indian title and are further of the opinion that there were no legal or equitable claims that grew out of the taking of this Indian title, we would reverse the judgment of the Court of Claims and direct that the bill of the respondents should be dismissed. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335.